TEXAS REGISTER

Volume 22 Number 66 September 5, 1997 *Pages 8769-9175*

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Artist: *Pedro Torres*

10th Grade

Zapata High School

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Texas Register, **ISSN 0362-4781,** is published each Friday, 52 times a year. Issues will be published by the Office of the Secretary of State, 1019 Brazos, Austin, Texas 78701. Subscription costs: printed, one year $95, six month $75. Costs for diskette and online versions vary by number of users (see back cover for rates). Single copies of most issues for the current year are available at $7 per copy in printed or electronic format.

The ***Texas Register*** is published under the Government Code, Title 10, Chapter 2002. Periodical Postage is paid at Austin, Texas.

POSTMASTER: Please send form 3579 changes to the ***Texas Register***, P.O. Box 13824, Austin, TX 78711-3824.

a section of the
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ATTORNEY GENERAL

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Currency Exchange

Texas Department of Banking

Loans and Investments

Railroad Commission of Texas

Oil and Gas Division

Public Utility Commission of Texas

Practice and Procedure

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ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code, Title 4, §402.042 and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open record decisions are summarized for publication in the ***Texas Register***. The Attorney General responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the Attorney General unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. To request copies of opinions, phone (512) 462-0011. To inquire about pending requests for opinions, phone (512) 463-2110.

Opinions

RQ-954. Request from Mr. James W. Griffin, P.E., Executive Director, Texas Turnpike Authority, P.O. Box 190369, Dallas, Texas 75219, concerning whether the North Texas Tollway Authority is bound by an agreement executed by its predecessor, the Texas Turnpike Authority, with the Employees Retirement System.

RQ-955. Request from Ms. Kay Warren, Winkler County Auditor, P.O. Drawer O, Kermit, Texas 79745, concerning whether the food service contract for a county jail is subject to competitive bidding and related questions.

RQ-956. Request from The Honorable Fred Hill, Chair, Committee on Urban Affairs, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, concerning retirement coverage for public safety dispatcher employed by the City of Denton.

RQ-957. Request from The Honorable Rene O. Oliveira, Chair, House Economic Development, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, concerning whether the prevailing wage law, Government Code, Chapter 2258, applies to work performed by a contractor at Midwestern State University.

RQ-958. Request from The Honorable Cindy Marie Garner, District Attorney, 349th Judicial District, P.O. Box 1076, Crockett, Texas 75835, concerbing whether preparation of a "parole packet" to assist inmates of the Texas Department of Criminal Justice constitutes the unauthorized practice of law.

RQ-959. Request from The Honorable Thomas B. Sehon, Falls County District Attorney, P.O. Box 413, Marlin, Texas 76661, concerning whether a justice of the peace is required to deposit all funds he collects with the county treasurer.

RQ-960. Request from The Honorable Joe F. Grubbs, Ellis County and District Attorney, County Courthouse, Waxahachie, Texas 75165-3759, concerning authority of a commissioners court to assist in funding a branch of a "small business development center".

RQ-961. Request from The Honorable John W. Segrest, Criminal District Attorney, McLennan County, 219 North 6th Street, Suite 200, Waco, Texas 76701, concerning whether a county judge may delegate authority to hear liquor license applications.

RQ-962. Request from The Honorable Barry S. Green, District Attorney, 271 Judicial District, Wise County Courthouse, Suite 200, Decatur, Texas 76234, concerning proper forum for filing an affidavit to surrender principal on an individual who has not been indicted.

RQ-963. Request from The Honorable Frank H. Bass, Jr., Montgomery County Attorney, Courthouse, Conroe, Texas 77301, concerning authority of a commissioners court to set salaries for employees of a juvenile probation department.

RQ-964. Request from Ms. Matilde Torres, Kleberg County Auditor, P.O. Box 72, Kingsville, Texas 78363, concerning authority of a commissioners court with regard to a county auditor.

RQ-965. Request from Patti J. Patterson, M.D., Commissioner of Health, Texas Department of Health, 1100 West 49th Sreet, Austin, Texas 78756-3199, concerning clarification of Letter Opinion 96-103 (1996) regarding the regulation of kinesiotherapists.

TRD-9711393

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PROPOSED RULES

Before an agency may permanently adopt a new or amended section or repeal an existing section, a proposal detailing the action must be published in the ***Texas Register*** at least 30 days before action is taken. The 30-day time period gives interested persons an opportunity to review and make oral or written comments on the section. Also, in the case of substantive action, a public hearing must be granted if requested by at least 25 persons, a governmental subdivision or agency, or an association having at least 25 members.

Symbology in proposed amendments. New language added to an existing section is indicated by the use of **bold text**. [Brackets] indicate deletion of existing material within a section.

TITLE 4. AGRICULTURE

Part I. Texas Department of Agriculture

Chapter 7. Pesticides

The Texas Department of Agriculture proposes the repeal of §§7.1-7.31 and new §§7.1-7.3, 7.10-7.14, 7.20-7.26, 7.30- 7.40, 7.50-7.53, 7.60-7.62 and 7.70-7.71 (Chapter 7), concerning Pesticide Regulations. House Bill 1144, 75th Legislature, 1997, consolidated the Texas Agriculture Code, Chapters 75 (the Texas Herbicide Law) and Chapter 76 (the Texas Pesticide Law), requiring the consolidation of current regulations adopted under those chapters. The repeal and new Chapter 7 are proposed to allow the department to consolidate the department's current herbicide regulations found at Chapter 11 of this title and the department's pesticide regulations, to make the sections consistent with changes made by the 75th Legislature, and to make the sections more clear and concise. The repeal of Chapter 11 is being proposed as a separate submission.

The new sections primarily consolidate existing regulations found in Chapter 7 and Chapter 11 and rearrange current sections of Chapter 7 to make the regulations more user-friendly. In addition, the following changes have been made to existing regulations to conform with legislative changes enacted by the 75th Legislature. At new §7.20, license fee exempt status of noncommercial applicators employed by a governmental agency has been eliminated and the license term for pesticide dealers is changed from a one-year to a two-year period. At new §7.22, changes were made to licensing requirements for applicators that allow the department to approve entities other than the Texas Agricultural Extension Service to conduct private applicator training and to clarify departmental requirements for persons exempted from licensing with the Structural Pest Control Board. New §7.23 exempts veterinarians from the pesticide applicator licensing requirement. Proof of financial responsibility requirements found at new §7.23 are changed to place the responsibility for having proof of financial responsibility on the applicator business instead of the individual commercial applicator. Commercial applicators will be required to provide to the department information regarding the applicator business employing them, or with which they contract. New requirements for private applicators to maintain records of restricted-use or state-limited-use pesticides or regulated herbicides for a period of two years are found at new §7.33. At new §7.31, the requirement for commercial applicators to be physically present to supervise non-licensed persons working under their supervision is changed to require availability when and if needed. Authority for issuance of a stop use, stop distribution or removal order, found at new §7.61, has been combined to allow for enhanced enforcement options when violations of pesticide regulations are detected. Additional changes are made throughout the new regulations to incorporate present herbicide regulation requirements and modify language for clarity or eliminate repetitiveness.

Donnie Dippel, Assistant Commissioner for Pesticide Programs, has determined that for the first five-year period the repeal and new sections are in effect there will be no fiscal implications for state government as a result of enforcing or administering the sections because new fees to be paid for the licensing of noncommercial applicators who are state employees will be paid by the state entity employing the applicator. There will be an increase in cost to local government for the licensing of noncommercial applicators. The specific cost will be based on payment of a license fee of $100 per applicator and will depend on the number of applicators licensed. All other fees remain at their current levels.

Mr. Dippel also has determined that for each year of the first five years the repeal and new sections are in effect, the public benefit anticipated as a result of enforcing the new sections will be more concise regulations with clearer terminology. There will be an effect on small or large businesses due to dealer licensing terms being changed from a one year to a two year period. Pesticide dealers will be allowed to obtain licenses for distribution of pesticide products on a two year cycle, resulting in less burdensome annual licensing requirements. The anticipated increased economic costs to persons who are

required to comply with the new sections as proposed will be payment of a license fee $100 for noncommercial applicators who are government employees and making applications for other than research or educational purposes, and a $10 license fee for governmental noncommercial applicators making applications for research or educational purposes.

Comments on the proposal may be submitted to Donnie Dippel, Assistant Commissioner for Pesticide Programs, P.O. Box 12847, Austin, Texas 78711. Comments on the proposal must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*. The department will hold public hearings to receive public comment on the proposal. Notice of these hearings will be published in the *Texas Register*.

4 TAC §§7.1–7.31

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Agriculture or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals of §§7.1-7.31 is proposed under the Texas Agriculture Code, Chapter 76, as amended by House Bill 1144, 75th Legislature, 1997, including §76.004, which provides the department with the authority to regulate the use of pesticides and provides the department with the authority to carry out the provisions of Chapter 76. The Texas Agriculture Code, Chapter 76 is affected by this proposal.

§7.1. Definitions.

§7.2. Resident Agents.

§7.3. Registration of Pesticides.

§7.4. Label Requirements.

§7.5. Custom Blends.

§7.6. Special Local Needs.

§7.7. Experimental Use Permits.

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§7.9. Enforcement.

§7.10. Applicator Certification.

§7.11. Licensing Requirements for Commercial and Noncommercial Applicants.

§7.12. Commercial Applicator License.

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§7.14. Noncommercial Applicator License.

§7.15. Private Applicators.

§7.16. Applicator Recertification.

§7.17. Expiration and Renewal of Licenses.

§7.18. Records.

§7.19. Registration and Inspection of Equipment.

§7.20. Complaint Investigation.

§7.21. Storage and Disposal of Pesticides.

§7.22. Use Inconsistent with Label Directions.

§7.23. State Plan for Certification of Applicators.

§7.24. State-Limited-Use Pesticides.

§7.25. Scope of Pesticide Application Standards.

§7.26. Notification Requirements.

§7.27. Forbidden Pesticide Practices.

§7.28. Sodium Fluoroacetate (Compound 1080) Livestock Protection Collar-State Limited-Use Requirements.

§7.29. M-44 Sodium Cyanide-State Limited-Use Requirements.

§7.30. Supervision.

§7.31. Expiration Provision.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711132
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–7541

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Subchapter A. General

4 TAC §§7.1–7.3

New §§7.1-7.3 are proposed under the Texas Agriculture Code, Chapter 76, as amended by House Bill 1144, 75th Legislature, 1997, including §76.004, which provides the department with the authority to regulate the use of pesticides and provides the department with the authority to carry out the provisions of Chapter 76.

The Texas Agriculture Code, Chapter 76 is affected by this proposal.

§7.1. Definitions.

In addition to the definitions set out in the Code, §76.001, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

Act-Texas Agriculture Code, Chapter 76, entitled Texas Pesticide and Herbicide Regulation.

Adjoining-Directly contiguous to a field on which pesticides may be applied or which is separated from a field only by a road, railway, or utility right-of-way, or by a government-owned land corridor or waterway having a width of not more than 100 feet.

Agricultural commodity-A plant or animal grown for sale, lease, barter, feed, or human consumption and animals raised for farm or ranch work.

Application-The placing of a pesticide on a plant, animal, building, or soil; or its release into the air or water to prevent or destroy pests.

Code-The Texas Agriculture Code.

Commissioner-The commissioner of agriculture of the State of Texas, or the commissioner's designee.

CEU-Continuing Education Unit.

Dealer-Any person who distributes within or into this state any restricted-use or state-limited-use pesticides or regulated herbicides.

EPA-United States Environmental Protection Agency.

Extension-Texas Agricultural Extension Service.

FAA-Federal Aviation Administration.

Farm labor camp-Housing used by one or more seasonal, temporary, permanent, or migrant workers and accompanying dependents which are owned, operated, or managed by the farm operator or licensed by the State of Texas.

Farm operator-The person responsible for the overall control and management of the crop.

Formulation-A mixture of active and inert ingredients prepared for use as a pesticide for practical use.

Nurseryman-A person who possesses a current Class 1, 2, 3, or 4 nursery and floral certificate issued by the department.

Person-Includes any individual, partnership, association, corporation, company, joint stock association, governmental subdivision, public or private organization of any character, body politic or any organized group of persons, whether incorporated or not; including any trustee, receiver, assignee, or similar representative thereof.

Regulated herbicide-A herbicide product containing an active ingredient classified as a regulated herbicide by §7.30 of this title (relating to Classification of Pesticides).

State-limited-use pesticide-Any pesticide product containing an active ingredient classified as a state-limited-use pesticide by §7.30 of this title (relating to Classification of Pesticides).

Trained trainer-Anyone who has completed an EPA-approved WPS train-the-trainer program or a WPS-trained handler who may train workers only.

Volatility-The tendency of a substance to change from a liquid or solid to a gaseous state. It is the movement of a pesticide in a gaseous state in the air from surface water, soil, or vegetation.

§7.2. Resident Agents.

(a) Any person designated by an out-of-state applicant as a resident agent for service of process in this state pursuant to subchapters C, D, or E of the Act shall:

(1) be a citizen of this state; and

(2) maintain a permanent address within this state where documents dealing with the administration and enforcement of the Act may be served.

(b) Any person required to designate a resident agent shall notify the commissioner in writing within 10 days of any change of a resident agent. Failure to give such notice shall be grounds for suspension of a registration, license or permit.

(c) Failure by an out-of-state applicant to designate a resident agent may be grounds for denial of an application for registration, license or permit.

§7.3. Expiration Provision.

Unless specifically acted upon by amendment or repeal and substitution of a new section or sections in accordance with the Texas Government Code, Chapter 2001, Subchapter B, or specific reactivation by the department, all of the sections in this chapter shall expire on August 31, 2001.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711133
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–7541

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Subchapter B. Registration

4 TAC §§7.10–7.14

New §§7.10-7.14 are proposed under the Texas Agriculture Code, Chapter 76, as amended by House Bill 1144, 75th Legislature, 1997, including §76.004, which provides the department with the authority to regulate the use of pesticides and provides the department with the authority to carry out the provisions of Chapter 76; and §76.044, which provides the department with the authority to set and charge a fee for each pesticide registered with the department.

The Texas Agriculture Code, Chapter 76 is affected by this proposal.

§§7.10. Registration of Pesticides.

(a) In addition to the requirements contained in the Act, Subchapter C (concerning registration), the application for registration of a pesticide shall include:

(1) a material safety data sheet (MSDS) which complies with the provisions set forth in 29 Code of Federal Regulations §1910.1200(g);

(2) an EPA-stamped accepted label and any applicable comments for a pesticide that must be federally registered under FIFRA;

(3) the EPA product code for each active ingredient; and

(4) a fee of $350 per product registered for a two year period. This fee may be prorated in accordance with subsection (f) of this section.

(b) Product registration may be denied or revoked and the registration fee forfeited if the application is incomplete or inaccurate.

(c) If the registrant distributes a pesticide under more than one brand name or more than one formulation, each brand or formulation must be registered as a separate product.

(d) It shall be a violation to continue to distribute a pesticide for which a renewal application, including the required fee, has not been received on or before the last day of the current registration. It is the responsibility of the registrant to obtain and submit an application for registration of a pesticide before the renewal date as prescribed in subsection (f) of this section.

(e) Late fees will be assessed on renewal applications postmarked after the renewal date as prescribed in subsection (f) of this section, as provided by the Code, §12.024.

(f) All pesticide products registered by a registrant must be renewed by the scheduled renewal date included in the registration package as provided by the department. Any new product registered by a registrant will be prorated by quarter so that the registration will expire at the same time as all other pesticide products of the registrant.

(g) Any written recommendations allowed by FIFRA 2(ee) must be approved by the department prior to being released into the channels of trade.

(h) Registration is not required for a chemical composition being used only to develop plot data on a total of 10 acres or less in the state.

(i) After a product is registered with the department, registrants shall provide the department the most current pesticide product label anytime the product label is amended. Before distributing the revised product label, the registrant must have written department approval in addition to any applicable federal requirements.

§7.11. Label Requirements.

(a) Each pesticide distributed in this state shall bear a label containing the following information related to the pesticide:

(1) the label information required by FIFRA, if the pesticide is subject to registration under that law; or

(2) the following information, if the pesticide is not subject to registration under FIFRA: the accepted common name and/or chemical name of all active ingredients; the percentage by weight of each active ingredient and the percentage by weight of all inert ingredients;

(A) the name for each ingredient using the accepted common name, if there is one, followed by the chemical name; and

(B) a statement of percentages except that a sliding scale method of expressing percentages shall not be used (example: active ingredient name–6.0% to 8.0%);

(3) the directions for use including, but not limited to the following:

(A) that it is a violation of federal and state law to use this product in a manner inconsistent with its labeling;

(B) to keep out of reach of children;

(C) application rates of product to be applied;

(D) proper mixing procedures;

(E) application methods;

(F) application limitations;

(G) restricted entry and preharvest intervals; and

(H) clean-up, storage, and disposal instructions;

(4) the net weight or measure of contents, exclusive of wrappers, or other materials:

(A) the net weight or measure of contents shall be the average contents unless explicitly stated as a minimum quantity;

(B) if the pesticide is a liquid, the net content statement shall be in terms of liquid measure at 68 degrees Fahrenheit (20 degrees Celsius) and shall be expressed in conventional American units of fluid ounces, pints, quarts, and gallons;

(C) if the pesticide is a solid or semisolid, viscous or pressurized, or is a mixture of liquid and solid, the net content statement shall be in terms of weight expressed as avoirdupois pounds and ounces;

(D) in all cases, net content shall be stated in terms of the largest suitable units (for example: "one pound, 10 ounces," not "26 ounces");

(E) in addition to the required units, specific net content may be expressed in metric units; and

(F) variation above or below minimum content or around an average is permissible only to the extent that it represents deviation unavoidable in good and workman like manufacturing practice; and,

(5) numbers or other symbols to identify the manufacturer's lot and batch. These shall be stamped on the pesticide container any place where they can be readily seen; provided, however, it shall be unlawful to have more than one lot or batch number in a single package.

§7.12. Custom Blends.

(a) A custom blend is a pesticide - fertilizer, pesticide - pesticide, or a pesticide - animal feed mixture that is produced on special request for a specific customer. Custom blends shall only be distributed or prepared according to the following criteria:

(1) the custom blend is prepared to the order of the customer and is not held in inventory by the blender;

(2) the custom blend is to be used on the customer's property (including leased or rented property);

(3) the pesticide(s) used in the custom blend bears end-use labeling directions which do not prohibit use of the product in such a custom blend;

(4) the custom blend is prepared with registered pesticides;

(5) the custom blend is delivered or distributed to the customer along with a copy of the end-use labeling of each pesticide used in the blend and a statement specifying the composition of the mixture; and

(6) no other pesticide production activity is performed at the establishment.

(b) If a restricted-use or state-limited-use pesticide or regulated herbicide is used in the custom blend, the establishment must be licensed as a pesticide dealer in accordance with the Act, Chapter 76, Subchapter D, and §7.20 of this title (relating to Application).

(c) Any pesticide containers used in preparing a custom blend, in which a partial amount(s) is still contained within the container, must be prominently identified as a pesticide to be used by that establishment only in a custom blend or in a commercial application made by that establishment.

§7.13. Special Local Needs.

Before approving the registration of a pesticide under the Act, §76.045, the department shall determine:

(1) that a local need exists;

(2) that the applicant meets all federal requirements for registration of a pesticide;

(3) that the particular use of the pesticide has not been denied, suspended, or canceled by the EPA; and

(4) that the products efficacy data support the claims made for it in Texas prior to approval of the application by the department.

§7.14. Experimental Use Permits.

(a) All experimental use permits (EUP) shall be issued and approved by the EPA prior to submitting to the department for approval.

(b) Application for department approval of the EUP shall contain the following information:

(1) the name and address of the applicant;

(2) the name of the manufacturer of the product;

(3) the name and address of the person responsible for the experimental program, if different from the applicant;

(4) the name of the pesticide and approved EUP registration number of the product;

(5) an ingredient statement;

(6) the use or uses requested for the EUP;

(7) the estimated amount of the product to be used;

(8) the name and address of all cooperators and location of the proposed EUP experimental use permit application site(s); and

(9) the proposed method of storage and disposition of any unused experimental use pesticide and its container.

(c) Pesticide registration fees, as established by §7.10 of this title (relating to Registration of Pesticides), are prorated by quarter from the effective date of the EUP and shall accompany each EUP application if the pesticide is not currently registered for other uses in the state by that registrant.

(d) The holder of an EUP shall, as soon as available, submit to the department the results of the experimentation for which the permit was issued.

(e) A person who distributes, sells, offers for sale, holds for sale, ships, delivers for shipment, or receives and (having so received) delivers or offers to deliver any pesticide may not place or sponsor advertisements in this state which recommend or suggest the purchase or use of a pesticide for a use authorized under an EUP, whether the EUP has been approved by the department or not.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711134
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture

Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–7541

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Subchapter C. Licensing

4 TAC §§7.20–7.26

New §§7.20-7.26 are proposed under the Texas Agriculture Code, Chapter 76, as amended by House Bill 1144, 75th Legislature, 1997, including §76.004, which provides the Texas Department of Agriculture with the authority to regulate the use of pesticides and adopt rules for the carrying out of provisions of Chapter 76; §76.073, which provides the department with the authority to fix and charge a fee for a dealer license; and, §§76.106, 76.108, and 76.112, which provide the department with the authority to fix and collect a fee for applicator testing and licensing of commercial and private applicators.

The Texas Agriculture Code, Chapter 76 is affected by this proposal.

§7.20. Application.

(a) An application for a commercial, or noncommercial or private applicator license will be deemed complete when the applicator has met the applicable licensing requirements.

(b) Application for pesticide dealer or applicator licenses shall be made on a form prescribed by the department.

(c) The fee for a new dealer license will be prorated as outlined on the License Application form to coincide with the December 31st expiration date. Renewals made after the expiration date are subject to applicable late fees.

(d) Licensing and renewal fees are:

(1) Dealers: $200 for two years;

(2) Applicators:

(A) Commercial: $150 for one year;

(B) Noncommercial: $100 for one year;

(C) Noncommercial applicators who qualify to license in the education and research category, as described in §7.22(e) of this title (relating to Licensing of Applicators): annual fee of $10;

(D) Private: $50 for five years;

(E) Certified Private: fee exempt. This certificate is no longer issued and was only available to individuals certified prior to January 10, 1989. Existing certificates may be renewed and are fee exempt.

(e) Fees for a new commercial or noncommercial applicator license application submitted after September 1 of each year will be prorated to include the remaining months of the current licensing year and the following licensing year.

(f) A pesticide applicator or dealer's license is not transferable. Change of ownership of an outlet or facility shall require a new application and applicable fees to be submitted.

(g) The licensee shall notify the department within 30 days of any change in the information provided as part of the application for a license. Failure to provide such information may be grounds for denial, suspension or revocation of the license.

(h) A commercial or noncommercial applicator in good standing may convert the license between these two categories by making application to the department and meeting the requirements for that license, including fees.

§7.21. Applicator Certification.

(a) The department may certify applicators in the following license use categories and subcategories:

(1) agricultural pest control:

(A) field crop pest control;

(B) fruit, nut and vegetable pest control;

(C) weed and brush control in pasture and rangeland;

(D) predatory animal control;

(E) farm storage pest control and fumigation;

(F) animal pest control;

(G) citrus pest control; and

(H) livestock protection collar application;

(2) forest pest control;

(3) ornamental plant and turf pest control (except as provided in subsection (c)(2) of this section);

(A) plant pest and weed control; and

(B) greenhouse pest control;

(4) seed treatments;

(5) right-of-way pest control;

(6) aquatic pest control:

(A) aquatic plant and animal pest control; and

(B) anti-fouling paint;

(7) demonstration and research;

(8) regulatory pest control;

(9) aerial application;

(10) chemigation;

(11) M-44 (Sodium Cyanide application in accordance with §7.40 of this title (relating to M-44 Sodium Cyanide - State-Limited- Use Requirements)); and

(12) education and research.

(b) Private Applicators.

(1) Producers of agricultural commodities who complete an Extension or other department approved training program for private applicators and obtain a passing score on the private applicator test may be certified in each of the categories and subcategories listed in subsection (a)(1)(A)-(G), (2), (3), (4), (6)(A), and (10) of this section. A private applicator may be certified as an aerial applicator by obtaining a passing score on the aerial applicator category test. Private applicators will not be charged a test fee.

(2) The department may allow an entity other than Extension to conduct private applicator certification training if the training program:

(A) has significant educational or practical content to maintain appropriate levels of competency;

(B) consists of at least three hours of net instruction time;

(C) complies with all applicable federal and state laws including the Americans With Disabilities Act (ADA) requirements for access to training programs; and

(D) is submitted to the department for review and is approved prior to training.

(3) An approved training program may include lectures, panel discussions, organized video or film with live instruction or other activities approved by the department.

(4) Private applicator certification training program content must include, but is not limited to:

(A) recognition of common pests to be controlled and the damage caused by them;

(B) reading and understanding laws and regulations and label and labeling information, including the common name of the pesticide to be applied, pest to be controlled, application timing and methods, safety precautions, pre-harvest or reentry provisions and any specific disposal procedures;

(C) application of pesticides in accordance with label instructions and warnings, including the ability to prepare the proper pesticide concentration to be used under particular circumstances taking into account such factors as area to be covered, speed at which application equipment will be driven and the quantity dispersed in a given period;

(D) recognition of local environmental situations that must be considered during application to avoid contamination;

(E) recognition of poisoning symptoms and procedures to be followed in case of a pesticide related accident; and

(F) recognition and identification of Integrated Pest Management (IPM)strategies applicable to the agricultural operation.

(5) The department may deny, revoke, or refuse to renew approval for any or all private applicator training programs or sponsors if the sponsor fails to provide to the department, upon request, records of training; fails to provide the quality of training approved by the department; or fails to comply with any other requirements that are a basis for approval or that are a part of these rules.

(6) The department may request prior notification of any scheduled training programs to be offered by the sponsor.

(7) Each training program must be approved by the department. No activity may claim to be approved or accepted by the department or use any other such term that would lead a person to believe that it has been approved by the department unless it is so approved.

(8) Each training program shall be approved for one calendar year only.

(9) Department personnel may monitor all approved private applicator training programs, and all fees charged by the sponsor shall be waived for department personnel who monitor the training program.

(10) Upon completion of private applicator training, the sponsor shall direct trainee(s) to the department for testing.

(11) In order for a private applicator training course to be approved by the department, the sponsor must:

(A) submit a completed department-prepared application form;

(B) provide any additional material relevant to the activity which is requested by the department; and

(C) submit the application and information required by the department at least 30 days in advance of the first date of the activity. The department may waive the 30-day provision providing all other requirements are met. The department will respond to the sponsor within ten days of receipt of the application and approve, reject, or request additional information.

(12) Sponsors who wish to continue course approval must file for renewal annually on a form prepared by the department.

(c) Commercial and Noncommercial Applicators.

(1) Commercial and noncommercial applicators certified in category (a)(7)-(10) of this section must also be certified in one or more categories from category (a)(1)-(6) of this section prior to performing regulatory pest control or research and demonstration pest control.

(2) The department will certify a commercial applicator in the ornamental plant and turf pest control category only if the person is also a nurseryman or if the applicator restricts application only to ornamental and turf plants at the production site.

(3) A person exempted from licensing requirements pursuant to of the Structural Pest Control Act (Vernon's Texas Civil Statutes, Article 135b-6), Section 11 (2) and (6) must be licensed with the department regardless of the use classification of the pesticide.

§7.22. Licensing of Applicators.

(a) All testing conducted by the department under the authority of the Act, Subchapter E, shall be designed to cover the information necessary for an applicant to demonstrate competency to use and supervise the use of restricted-use and state-limited- use pesticides or regulated herbicides in a safe and effective manner.

(b) The department may enter into a memorandum of agreement with another state or a federal agency for reciprocity in licensing pesticide applicators.

(c) Doctors of veterinary medicine are exempted from licensing when:

(1) applying restricted-use or state-limited-use pesticides or regulated herbicides as drugs or medication during the course of normal practice; or

(2) when applying any pesticides not classified as restricted- use by EPA to property owned, rented or under the veterinarian's general control.

(d) Commercial and noncommercial applicators must meet the following requirements:

(1) Anyone who makes a passing score on the general pesticide applicator examination, the laws and regulations examination, and on one or more category tests will be eligible to be certified in those categories or subcategories for which a passing score was received and shall be licensed as soon as all other licensing requirements are met. Applicators may certify in the subcategory listed in §7.21(a)(6)(B) of this title (relating to Applicator Certification) by passing a test pertaining to that subcategory and related laws and regulations and fulfilling other licensing requirements; however, applicators who license in this manner may not add other categories without successfully completing the general pesticide applicator examination and the laws and regulations examination.

(2) A fee of $20 shall be required for testing each applicant in each license use category and subcategory, and must be paid at the time the test or tests are given. Political subdivision employees may submit a purchase order number in lieu of payment at time of the exam.

(3) Individual test scores are valid for only 12 months.

(e) Employees of State Universities, Extension and Experiment Stations may license in the noncommercial category if they meet the following requirements:

(1) Employees of state universities, Extension and experiment stations involved in demonstration and research, in the education of pesticide applicators and/or the application of restricted-use pesticides, state-limited-use pesticides and regulated herbicides may be licensed by the department in the research and education category.

(2) Employees of state universities, Extension and experiment stations who wish to become certified as noncommercial applicators in this category must meet the same requirements for noncommercial licensing as described in §7.21 of this title (relating to Applicator Certification) and this section.

(3) Employees licensed in the education and research category must surrender their research and education category upon termination of employment with a state university, Extension or experiment station and pay the full noncommercial license fee.

(4) Persons who qualify to license in the education and research category are exempt from exam fees.

(f) Private applicators must meet the following requirements:

(1) A private applicator certification or license may be revoked by the department if the applicator is not engaged in the production of an agricultural commodity.

(2) An employee who qualifies as a private applicator under the Act, Section 76.112(c), is not considered to be providing equipment or pesticide when the employer is identified on the private applicator's certification license application or amendment thereof, and either:

(A) the pesticide or equipment is purchased by the private applicator using a check, cash, or account of the employer; or

(B) the private applicator is reimbursed by the employer for the equipment or pesticide.

(3) Retraining and retesting shall be required of anyone who does not complete requirements for licensing within 5 years of passing the private applicator examination.

§7.23. Applicator Business Proof of Financial Responsibility.

Each applicator business, as defined in the Act, §76.111, shall file with the department proof of financial responsibility prior to making any applications of restricted-use or state-limited-use pesticides or

regulated herbicides. This requirement shall be satisfied in the following manner.

(1) If the applicator business is a licensed commercial applicator, the applicator shall, on application for or renewal of the commercial applicator license, attest to the existence of adequate financial responsibility in the amounts and under the terms stated in the Act, §76.111.

(2) An applicator business that is not a licensed commercial applicator, but instead employs one or more licensed commercial applicators, shall attest to the existence of adequate financial responsibility in the amounts and under the terms stated in the Act §76.111 on a form provided by the department.

(3) Commercial applicators who are employees or agents of an applicator business shall be required to state, on application for or renewal of their commercial applicator license, the name of the applicator business by whom they are employed. Employees or agents of an applicator business are prohibited from making any applications of restricted-use or state-limited-use pesticides or regulated herbicides until such time as the applicator business has complied with paragraph (2) of this section.

§7.24. Applicator Recertification.

(a) All applicators must meet recertification requirements through completion of approved continuing education activities.

(b) Approved activities may include lectures, panel discussions, organized video or film with live instruction, field demonstrations, or other activities approved by the department.

(c) Each activity must be approved by the department. No activity may claim to be approved or accepted by the department or use any other such term that would lead an applicator to believe that it has been approved by the department for recertification unless it is so approved.

(d) The department shall assign no more than one continuing education unit (CEU) for each hour of net actual instruction time presented at an approved activity.

(e) To be eligible for approval, the department will require:

(1) that the activity have significant educational or practical content to maintain appropriate levels of competency;

(2) that the activity be conducted by a university, a governmental agency, an association, or a private independent nonapplicator business;

(3) that each activity has a recordkeeping procedure for verifying applicator attendance using department forms or approved formats;

(4) that activities cover one or more of the following topics pertaining to pesticides:

(A) label and labeling comprehension;

(B) safety factors;

(C) environmental consequences;

(D) pest features;

(E) integrated pest management strategies/pest management practices;

(F) pesticide factors;

(G) equipment characteristics;

(H) application techniques/drift minimization;

(I) laws and regulations;

(J) biotechnology/transgenic crops; or

(K) business ethics; and

(5) the activity is able to comply with all applicable federal and state laws, including the Americans With Disabilities Act (ADA) requirements for access to activities.

(f) Prior approval shall not be required for applicator recertification courses of up to three CEUs conducted by Extension faculty or department personnel for any pesticide applicator, provided that all other requirements for course content and records are met. The department may enter into a memorandum of agreement with Extension regarding the specific requirements for applicator recertification.

(g) Department personnel may monitor all approved activities, and all fees charged by the sponsor shall be waived for department personnel who monitor the recertification activity.

(h) The department may deny, revoke, or refuse to renew approval for any or all courses of a sponsor if the sponsor fails to file a timely activity report, fails to provide the quality of activity approved by the department, or fails to comply with any other requirements that are a basis for approval or that are a part of these rules.

(i) The department may enter into a memorandum of agreement with another state or non-profit professional society or association to recognize the state's pesticide applicator recertification or the society's professional recertification for satisfaction of the requirements of this section for commercial, noncommercial and private applicator recertification only if:

(1) the standards for recertification meet or exceed the standards for the one-year or five-year recertification periods as set out in this section; and

(2) the agreement reduces duplication of effort and does not increase the recordkeeping burden of the department.

(j) Each continuing education activity shall be approved for one calendar year only.

(k) In order for a recertification activity to be approved by the department, the sponsor must:

(1) submit a completed department-prepared application form;

(2) provide any additional material relevant to the activity which is requested by the department; and

(3) submit the application and information required by the department at least 30 days in advance of the first date of the activity. The department may waive the 30-day provision providing all other requirements are met. The department will respond to the sponsor within ten days of receipt of the application and approve, reject, or request additional information.

(l) Sponsors who wish to continue approval must file for renewal annually on a form prepared by the department.

(m) Sponsors of approved activities shall:

(1) prepare a roster of applicators that attend the activity which contains, at a minimum, the pesticide applicator's name and current license or certificate number;

(2) distribute a completion certificate at the time of the activity to applicators who successfully complete an activity, which shall indicate the name of the sponsor, the date, county and name of the activity, the amount and type of credit earned, and the assigned course number;

(3) send the activity rosters to the department within 14 days after the end of an activity. The rosters must be on department forms or approved formats; and

(4) ensure that CEUs awarded correspond proportionately to the net instruction time.

(n) Governmental agencies may enter into an agreement with the department for annual submission of recertification records of agency employees attending a recertification program approved for the agency by the department.

(o) No credit will be given for time used to promote the sponsor or other activities of the sponsor or for time used for organizational, political, procedural, or other nonrelevant activities.

(p) Applicators will recertify through a self-certification program. Each applicator will be required to maintain proof of the number of CEUs necessary to renew a license or certificate. Certificates of completion verifying attendance at approved activities during the previous licensing period must be maintained for a period of 12 months after the most recent renewal of their license or certificate.

(q) Each commercial or noncommercial applicator must obtain at least five CEUs during the 12 months preceding December 31 in order to recertify and renew a license for the following year. A minimum of one hour each must be obtained from two of the following categories: integrated pest management, laws and regulations or drift minimization. An applicator who becomes unlicensed in any licensing year may not be relicensed for 12 months unless all CEUs required for the last year of licensing are completed. Until the 12 month period has elapsed, applicators are prohibited from retesting under §7.22 of this title (relating to Licensing of Applicators).

(r) Private applicators must recertify as follows:

(1) Each licensed private applicator must obtain 15 CEUs within a five year period including at least two credits in laws and regulations and two credits in integrated pest management, except that any five-year period that began prior to January 1, 1996, may be satisfied by obtaining two credits in laws and regulations and one credit in integrated pest management.

(2) Each licensed private applicator must obtain 15 CEUs prior to last day of February of the year their license expires.

(3) Private applicators issued a certificate prior to January 10, 1989, may fulfill their recertification requirement on a one-time only basis by completing the Extension private applicator training program, attaining a passing score on the private applicator test, and obtaining a private applicator license. Certified private applicators who choose not to license but wish to maintain certification under a certificate issued prior to January 10, 1989, will be required to recertify as specified for licensed private applicators in this subsection.

(4) Private applicators have the option of forgoing continuing education requirements for a recertification period by following these procedures:

(A) Take and pass a comprehensive examination administered by the department which will contain questions relevant to those topics which would be covered at various continuing education activities. A certificate of completion worth 15 CEUs will be issued by the department upon a passing score being attained by the applicator.

(B) If the applicator fails the examination, subsequent attempts will be allowed until a passing score is attained. If a passing score is not attained, the applicator may obtain the required CEUs pursuant to this subsection.

(C) Pay a required fee of $50 for each examination.

(s) Failure to comply with the continuing education requirement for commercial, noncommercial and private applicators will:

(1) result in nonrenewal of an applicator's license or certification until the necessary credits for continuing education are attained;

(2) prohibit applicators from retesting for a new license in lieu of meeting recertification requirements until one year after the expiration of their license;

(3) require the applicator to take and pass comprehensive department examinations for general knowledge and for each category in which the applicator seeks to be licensed if the applicator does not recertify and renew in one year following the expiration of the license;

(4) require retraining of commercial, noncommercial and private applicators for categories or subcategories requiring special training if the applicator does not recertify and renew in one year following the expiration of the license; and

(5) subject a noncompliant applicator to administrative, civil or criminal penalties and/or license or certificate revocation, suspension, modification or probation for failure to comply with continuing education requirements if the applicator operates under a license that has not been renewed.

(t) An applicator may seek credit for a continuing education activity that has not been submitted by the sponsor to the department, and the department will assign the number of credits for the activity when the activity meets the following:

(1) the activity contains course content of the highest standards;

(2) the activity is sponsored by an in-state or out-of-state institution of higher education, or an out-of-state regional or national association, or the state or federal government; and

(3) the activity is an area directly related to the activities of commercial, noncommercial or private applicator.

(4) The applicator shall provide the department with sufficient information describing activity content including the time allotted to each aspect of the activity, identification of sponsor, instructor's name and address, proof of attendance, date, time, and place of activity.

(5) The information for the desired credit must be submitted within 60 days after completion of the activity.

(u) An applicator may file a written request for an extension of time for compliance with any deadline in these rules. Such request for extension may granted by the department if the applicator files appropriate documentation to show good cause for failure to comply timely with the requirements of this subsection. Good cause means extended illness, extended medical disability, or other extraordinary hardship which is beyond the control of the person seeking the extension.

(v) Any person who is issued an initial license on or after September 1 in any year and has not been licensed at any time during the preceeding nine months, shall begin annual recertification requirements the following year and need not obtain any credits between September 1 and December 31 of that year. If credits are obtained during that period, they may be applied to the following year's requirement.

(w) Applicators licensed as both private and commercial or noncommercial may satisfy requirements for private applicator recertification by meeting the recertification requirements for commercial and noncommercial applicators.

§7.25. Expiration and Renewal of Licenses.

(a) A licensee who fails to file a complete application for renewal on or before the license expiration date must pay a late fee as prescribed by the Code, Chapter 12.

(b) The license of a person who fails to timely file a complete application for renewal is invalid until a completed application and any required late fee has been received by the department. A person who applies a restricted-use or state-limited-use pesticide or regulated herbicide during a period when the person's license is invalid may be assessed administrative penalties in addition to any required late fee.

(c) If a complete application for renewal of a commercial, noncommercial or private applicator's license is not submitted within one year after the expiration of the license, the license will be deemed to be terminated voluntarily and a renewal application will not be accepted. Before being licensed again, the applicator must meet the requirements for a new license.

(d) Pursuant to the Act, §76.113, the head of the licensing agency in determining whether additional training shall be required of current licensees before renewal of their applicator license may consider changes in technology, pesticide related problems, or the performance of individual applicators. If general retraining and/or retesting is required for all applicators in a category or subcategory, the licensing agency will publish notice at least six months in advance of the license renewal date. If individual retraining and/or retesting is required as a result of the applicator's performance, the agency may give notification and set a time and place of retraining that would be in the best interest of public health and environmental protection.

§7.26. State Plan for Certification of Applicators.

The department hereby adopts by reference the State of Texas Plan for Certification of Pesticide Applicators with appendices submitted by the department to the administrator of the Environmental Protection Agency pursuant to the requirements of 7 United States Code, §136(b)(2). A copy of the plan may be obtained upon request from the department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711135
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 6, 1997
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Subchapter D. Use and Application

4 TAC §§7.30–7.40

New §§7.30-7.40 are proposed under the Texas Agriculture Code, Chapter 76, as amended by House Bill 1144, 75th Legislature, 1997, including §76.004, which provides the department with the authority to regulate the use of pesticides and provides the department with the authority to carry out the provisions of Chapter 76; and Chapter 76, Subchapter G, which provides the department with the authority to adopt rules for the regulation of herbicide use.

The Texas Agriculture Code, Chapter 76 is affected by this proposal.

§7.30. Classification of Pesticides.

(a) Because of their potential to cause adverse effects to nontargeted vegetation, all pesticide products containing the active ingredients as specified in this subsection, alone or in mixtures, shall be classified as stated in paragraphs (1) and (2) of this subsection when distributed in containers of a capacity larger than one quart for liquid material or two pounds for dry or solid material. If the products are marketed using metric measures, the classification applies to containers larger than one liter or one kilogram, respectively:

(1) State-Limited-Use.

(A) 2,4-Dichlorophenoxyacetic acid (2,4-D); 2,4-Dichlorophenoxy butyric acid (2,4-DB); 2,4-Dichlorophenoxy propionic acid (2,4-DP); 2-Methyl-4-Chlorophenoxyacetic acid (MCPA); 3,6-Dichloro-o-anisic acid (dicamba); 3,4-Dichloropropionanilide (propanil); 5-bromo-3-sec-butyl-6- methyluracil (bromacil); and 2,4-bis(isopropylamino)-6-methoxy-s-triazine (prometon); and

(B) any and all pesticides and devices using the active ingredients sodium fluoroacetate (Compound 1080) and sodium cyanide, in any quantity, for livestock predation control are classified as state-limited-use pesticides. Additional requirements for the handling and use of Compound 1080 and sodium cyanide are provided at §7.39 of this title (relating to Sodium Fluoroacetate (Compound 1080) Livestock Protection Collar-State- Limited-Use Requirements) and §7.40 of this title; (relating to M-44 Sodium Cyanide-State-Limited-Use Requirements).

(2) Regulated Herbicides.

(A) 2,4-dichlorophenoxyacetic acid (2,4-D);

(B) 2-methyl-4-chlorophenoxyacetic acid (MCPA);

(C) 3,6-dichloro-o-anisic acid (dicamba).

(b) Formulations containing the active ingredients previously listed in this section are exempt from being classified as state- limited-use pesticides or regulated herbicides if they meet one of the criteria listed in paragraphs (1) or (2) of this subsection:

(1) specialty fertilizer mixtures packaged in containers of 50 pounds or less that are labeled for ornamental use and registered as required in the Code, Chapter 63, concerning commercial fertilizer; or

(2) products that are ready for use and require no further mixing or dilution before use and are packaged in containers with a capacity of one gallon or less for liquid formulations and four pounds or less for dry or solid materials.

§7.31. Supervision.

(a) If there is a discrepancy between supervision requirements contained in federal laws or regulations, state laws or regulations, or the pesticide label, the supervision requirement that requires the greatest degree of direct supervision by the licensed applicator shall apply. Licensed applicators may only supervise application of pesticides for categories or subcategories in which they are certified.

(b) A person may not supervise the use of a restricted-use or state-limited-use pesticide or regulated herbicide unless the person is licensed as a commercial, non-commercial or private applicator with the department. A certified private applicator may not supervise the use of restricted-use or state-limited-use pesticides or regulated herbicides. A licensed applicator may not supervise an applicator whose license or certificate is under revocation or suspension.

(c) A business that applies a restricted-use or state-limited-use pesticide or regulated herbicide to the land of another for hire must be operated by or employ a licensed commercial applicator. An application of a restricted-use or state-limited-use pesticide or regulated herbicide can only be made by the licensed applicator or by persons under the licensee's direct supervision.

(d) A licensed applicator is not required to be physically present at the time and place of a pesticide application to exercise direct supervision of application of a restricted-use or state-limited-use pesticide or regulated herbicide unless the label of the applied pesticide states that the presence of the licensed applicator is required. The licensed applicator must always be available when and if needed and is responsible for any actions of a person working under the licensee's direct supervision.

(e) Each licensed applicator is responsible for assuring that any person working under the licensee's direct supervision is knowledgeable of the label requirements and rules and regulations governing the use of the particular pesticide being used by the individual. Working includes transporting a restricted-use or state-limited-use pesticide or regulated herbicide in any type of distributing or transporting equipment ready for application; mixing, storing and handling in packages or containers that have been opened; and applying and disposing of restricted-use or state-limited-use pesticides or regulated herbicides and cleaning equipment used to apply the pesticide. At a minimum, instructions shall include a review of appropriate sections of the Texas pesticide law and the Texas pesticide regulations, and reading of complete labeling information for the particular use of the pesticide product being applied. To ensure that appropriate instructions have been given to a nonlicensed person, the licensed applicator must verify or provide handler training to the nonlicensed applicator in accordance with the requirements of WPS. Licensed applicators supervising individuals applying products not under the scope of WPS must review the label with the individual and have the individual sign and date the label.

(f) Nonlicensed employees of political subdivisions and cemeteries which are being supervised by licensed applicators to make any pesticide application shall either:

(1) obtain 5 CEUs per year. The continuing education required will be the same as the CEU requirements for licensed commercial and noncommercial applicators pursuant to §7.24 of this title (relating to Applicator Recertification); or

(2) be trained in the specific use of the pesticide applied. Training must be a formal training that includes laws and regulations and safety training. Training shall be done annually.

(g) Application by an unlicensed person shall not take place before the unlicensed person has received the required CEUs or training. The CEUs or training must have been completed within the last twelve months.

(h) Record of training and CEUs earned by the nonlicensed person shall be kept by the supervising licensee and must be kept for a period of two years and shall be made available to the department upon inspection or request. The record may be either a certificate of completion of training or must be kept on a form prescribed by the department.

§7.32. Records of Distribution.

(a) A person required to be licensed as a pesticide dealer by the Act, §76.071 shall maintain for a period of two years a record of each distribution of a restricted-use pesticide, state- limited-use pesticide, or regulated herbicide.

(b) The record of each distribution required to be kept by this section shall be kept separate from the person's other business records and shall contain:

(1) the name, address, applicator license or certificate number, dealer license number, or veterinary license number of the person to whom the pesticide is distributed;

(2) the date of the distribution;

(3) the brand name and the EPA registration number of the pesticide distributed;

(4) the quantity of the pesticide distributed; and

(5) if the pesticide is made available to a nonlicensed person acting under the authorization of the licensed or certified applicator or licensed dealer to whom the pesticide is distributed, the name and address of the nonlicensed person.

(c) Records of distribution shall be kept current and maintained at the place of business where distribution occurs as designated on the pesticide dealer's license.

(d) Records of distibution shall be made available for inspection by the department immediately upon request at any time during normal business hours.

(e) Copies of records of distribution must be submitted to the department within the time period specified in a written request by the department.

(f) Out-of-state licensed dealers who do not operate a physical distribution location in the state will be required to submit to the department, not later than the tenth day of each month, a record of all restricted-use or state-limited-use pesticides or regulated herbicides distributed into the state during the prior month. If no such

distributions were made for the prior month, the dealer shall submit a letter stating that no such distributions were made. Forms for submitting distribution records under this subsection may be obtained from the department. If the department form is not used, the form submitted must contain all the information required by this section.

(g) All licensed pesticide dealers shall maintain a list of poison control centers in the state or other sources of contact designed to provide medical assistance in emergencies involving pesticide poisoning.

§7.33. Records of Application.

(a) The following records of pesticide use shall be maintained for a period of two years:

(1) A person required by the Act to be licensed as a commercial applicator or a noncommercial applicator shall maintain records of each pesticide application regardless of the use classification of the pesticide applied.

(2) A person licensed or certified as a private applicator or licensed as a veterinarian shall maintain records of each application of a restricted-use pesticide, state-limited-use pesticide, or regulated herbicide.

(b) The record of each pesticide use required by this section shall contain:

(1) the date of the application;

(2) the beginning time for the application;

(3) the name of the person for whom the application was made;

(4) the location of the land where the application was made stated in a manner that would permit inspection by an authorized party;

(5) for each pesticide applied:

(A) the product name;

(B) the product EPA registration number;

(C) the rate of product per unit;

(D) the total volume of spray mix, dust, granules, or other materials applied per unit;

(E) the name of the pest for which the product was used;

(6) the site treated (e.g., name of crop, kind of animal, etc.);

(7) total acres or volume of area treated (e.g., acre, square feet, number of head, etc.);

(8) wind direction and velocity and air temperature;

(9) the FAA "N" number for aerial application equipment or identification number or decal number for other types of application equipment;

(10) the name and department license number of the applicator responsible for the application and, if different, the name of the person actually making the application; and

(11) the spray permit number for regulated herbicides applied in a regulated county.

(c) If several applications are made from a single load of pesticide to sites in close proximity, a single beginning time may be given for all the applications, but the sequence of applications must be specified by appropriately ordering the applications by person for whom the application was made and by the location of the land where the application was made.

(d) The record of each pesticide application shall be kept current and maintained at the applicator's principal place of business as designated on the applicator's application/renewal for a pesticide applicator's license.

(e) The record of each pesticide application shall be legible and in a format that clearly identifies and sets forth each specific item of information required by this section.

(f) The department may exempt specific record items, which may not be applicable to a type of application upon written request and written approval. The person responsible for keeping records under this section shall maintain a copy of the department's written approval for a record exemption as part of the application recordkeeping requirements of this section.

(g) Records of application shall be made available for inspection to the department immediately upon request at any time during normal business hours and shall contain all the information required by this section except as exempted in writing under subsection (f) of this section. The department's written approval for any record exemption shall be made available to the department representative conducting the records inspection at the time of the inspection.

(h) Copies of records of application must be submitted to the department within the time period specified in a written request by the department and must contain all of the information required by this section except as exempted in writing under subsection (f) of this section. A copy of the department's written approval for any record exemption shall accompany the copies of records submitted under this subsection.

§7.34. Storage and Disposal of Pesticides.

(a) No person may dispose of, discard, or store any pesticide or pesticide container in a manner that may cause or result in injury to humans, vegetation, crops, livestock, wildlife, pollinating insects, or pollution of any water supply or waterway.

(b) Pesticides intended for distribution or sale must be displayed or stored within an enclosed building or fenced area, and may not be displayed on sidewalks, parking lots, or similar open areas without surveillance.

(c) Bulk storage tanks, when not enclosed in a secured fenced area or a building, must have a lock on the dispensing device.

(d) Pesticides in leaking, broken, corroded, or otherwise unsafe containers, or with illegible labels shall not be displayed or offered for sale. Such containers shall be removed from display areas and segregated from other pesticides for distribution to prevent environmental contamination or health and safety hazards prior to proper disposal or return to manufacturer.

(e) Pesticide containers, concentrates, spray mixes, container rinsates, and/or spray system rinsates that are to be discarded shall be disposed of in accordance with pesticide label directions and in accordance with the provisions of the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361.

(f) The applicator, the owner of the pesticide, and/or the person in control of the mixing site shall be jointly and severally liable for proper storage and disposal of pesticide containers and contents.

§7.35. Registration and Inspection of Equipment.

(a) Application equipment used to apply a restricted-use or state- limited-use pesticide or regulated herbicide to the land of another for compensation must be identified by a license decal. The department shall issue a license decal to be attached to each such piece of equipment in a conspicuous place. The license decal will contain the following information:

(1) an identification number; and

(2) the name of the issuing agency.

(b) Notification shall be given to the department of any equipment ownership changes and the license decal must be removed before giving up possession of the equipment.

(c) All application equipment used for pesticide applications is subject to inspection by the department at any reasonable time. Such equipment must be maintained in a condition that will provide safe and proper application of the pesticide. If the inspector finds that it is not, the department shall require the needed repairs or adjustments before allowing the use of such equipment.

§7.36. Application of Worker Protection Standard.

(a) Workers and handlers must be trained in accordance with WPS.

(b) All certified and licensed applicators or trained trainers who conduct pesticide safety training must:

(1) maintain records of each trainee for five years. These records must include a copy of each dated class roster signed by the trainer and each trainee, with the verification card number issued to the trainee, and the city or county and state where the training occurred;

(2) issue EPA training verification cards only to trainees who have been trained in accordance with the requirements of the WPS, including the correct use of training materials developed or approved by EPA;

(3) record trainee information on the verification cards, in ink or other indelible form;

(4) issue EPA training verification cards that match EPA specifications or that comply with state variations from such specifications that have prior approval from EPA; and

(5) promptly respond to requests from EPA, state, or tribal agencies or agricultural employers for information concerning issued EPA training verification cards.

(c) The EPA WPS warning flag/sign referred to in WPS and §7.37 of this title (relating to Notification Requirements) must look like the one pictured as follows. Additional information may be included on the warning sign, such as the name of the pesticide or the date of application, if it does not lessen the impact of the flag/sign or change the meaning of the required information. If the required information is added in other languages, the words must be translated correctly. The flag/sign must be at least 14 inches by 16 inches, and the letters must be at least one inch high. For nursery and greenhouse operations, the warning sign/flag may meet the minimum requirements as approved by the EPA.
Figure: 4 TAC 7.36 (c)

§7.37. Prior Notification Requirements.

(a) Except as provided in subsection (n) of this section, the farm operator shall be responsible for meeting prior notification requirements. Responsibility may be transferred by contract to a second party. However, if the effective date of the transfer is unclear, both the farm operator and the second party may be held liable for any violation of these regulations.

(b) All applications of pesticides by ground application equipment, except airblast or mistblowing equipment, are exempted from this section.

(c) The following persons may request prior notification of a pesticide application:

(1) any person who works or resides in a building, house, or other structure located on land adjoining and within 1/4 mile of a field on which pesticides may be applied;

(2) persons in charge of licensed day-care centers, primary and secondary schools, hospitals, inpatient clinics or nursing homes within 1/4 mile of the field on which pesticides are to be applied. The parent of a primary or secondary school student may for good cause request notification from the department if the person in charge of the school has refused to request notification. If the department determines that notification should be given, the department shall notify the farm operator to give notification to the person in charge of the school; and

(3) any person with chemical hypersensitivities, allergies, or other medical conditions which may be aggravated by pesticide exposure and whose residence or place of employment is within 1/4 mile of the field on which pesticides are to be applied.

(d) Except as provided in subsection (n) of this section, requests for prior notification under this section shall be made in writing to the farm operator, and should include:

(1) the name and address of the person making the request;

(2) one home and business telephone number at which the person making the request can be reached and the hours that such person is normally at each number;

(3) the date of the request;

(4) the location of the field for which the request for notification is being made;

(5) a request to be notified prior to the application of any pesticides to the area described in paragraph (4) of this subsection or the trade name and/or common chemical name of specific pesticides for which prior notification is requested; and

(6) a request to be notified because of a medical condition that may be aggravated by pesticide exposure. Such requests must contain a licensed physician's signed confirmation of the medical condition.

(e) Requests for prior notification should be sent by certified mail. It shall be the responsibility of the person making the request to retain copies of the request and the return receipts of certified letters.

(f) A request for prior notification shall be effective through December 31 of the year that the request is received. A farm operator shall commence notifying a requesting party of scheduled pesticide applications within ten days of receipt of a request for notification. The department may extend the time to begin notifying a requesting party upon a showing of sufficient cause by the farm operator. The department shall notify the requesting party of any such extension.

(g) The following methods may be used for giving notification of a scheduled pesticide application:

(1) Except as provided by subsection (n) of this section if the request for notification is made pursuant to this section, the notification may be made by:

(A) raising a flag/sign.

(i) The EPA WPS posted warning flag/sign shall be raised to a height of at least approximately five feet, with the bottom of such flag/sign always at least two feet above the top of the crop, in or about the field to which pesticides are scheduled to be applied so that the flag/sign is located no farther than 650 yards from the nearest property line of any person requesting notification.

(ii) In the event of unusually tall crops, such as citrus, corn, or sugar cane, or limited access fields, the farm operator may raise a flag/sign at a distance greater than 650 yards from the nearest property line of the party requesting notification on a permanent pole to a height visible from the property line of the requesting party.

(iii) The telephone number of the farm operator shall be on or near the flag/sign, and the flag/sign shall be raised on the border of the field at a location to which the public has access for the purpose of reading the telephone number. The farm operator shall provide the name of the pesticide and the intended date and approximate time of the scheduled application when requested by the requesting party;

(B) giving notification in writing, in person, or by telephone in English or, when appropriate, Spanish; or

(C) other means mutually agreed upon by both parties. This agreement must be in writing and a copy filed with the department.

(2) If the request for notification is made pursuant to a medical condition, notification must be given in person or by telephone in English or, when appropriate, Spanish.

(A) If the farm operator is unable to reach a person entitled to notification under this paragraph after making reasonable efforts, the farm operator may immediately notify the department by telephone of the following information:

(i) the name and telephone number(s) of the farm operator;

(ii) the name and telephone number(s) of the requesting party;

(iii) the location of the field scheduled to be treated;

(iv) the intended date and approximate time of the pesticide application; and

(v) the trade and common chemical name of the pesticide.

(B) The department shall maintain a record of the information provided by the farm operator for the duration of the notification request.

(C) If the farm operator telephones the department between 8:00 a.m. and 5:00 p.m., Monday through Friday, the department shall immediately attempt to telephone the requesting party and give notification of the scheduled application. A record showing the date and time of all such attempts shall be maintained by the department for the duration of the notification request.

(3) If the request for notification is made pursuant to subsection (c)(2) of this section, notification may be given in person or by telephone in English or, when appropriate, Spanish. Alternatively, if mutually agreed by the farm operator and the person in charge of any such facility, notification may be given to such facilities by posting a flag/sign at a designated location.

(4) No request is necessary for prior notification of camps owned, managed, or controlled by the farm operator and located on the field; or licensed farm labor camps located on the field or within 1/4 mile of the field on which pesticides are to be applied. Notification shall be provided by telephone or in person to the head of each household. Alternatively, the farm operator may provide notification in writing by placing a written notice on a bulletin board to which the camp has access.

(5) A farm operator may notify the department that the farm operator has given or been unable to give a notification by telephone or in person to establish a record of such notice. The department shall maintain a record of such notification from operators to the department. It is a violation of this section to provide false information to the department about efforts to reach a requesting party or about failure to receive such notification.

(h) Notice given in writing, in person, or by telephone shall include:

(1) the intended date and approximate time of application;

(2) the trade and common chemical name, if requested, of the pesticide to be applied; and

(3) the location of the field on which the application is to be made.

(i) Notice shall be given not later than on the day prior to a scheduled pesticide application.

(1) Notice shall be deemed given pursuant to subsection (g)(1) and (3) of this section:

(A) at the time of delivery (in person, in writing, or by telephone) to the requesting person or at the time of delivery to the address provided in the request for prior notification;

(B) when the required flag/sign is raised; or

(C) as mutually agreed upon pursuant to an agreement authorized by subsection (g)(1)(C).

(2) Notice shall be deemed given pursuant to subsection (g)(4) of this section at the time of delivery of notification in person, by telephone, or by posting the required notice:

(A) at the time of delivery of notification in person or by telephone; or

(B) after the farm operator has made reasonable efforts to notify the requesting party by telephoning the requesting party at the number(s) provided during the time(s) specified in the written request.

(j) Advance notice need not be given on the day before when an immediate application is required and time does not reasonably allow the giving of notice on the day before a pesticide application. Notice of an emergency application shall be given:

(1) by the method selected pursuant to subsections (g)(1), (3) and (4) of this section as soon as reasonably possible before the application; or

(2) by telephone or in person to medically affected persons as soon as reasonably possible before the application. In no event shall notice of an emergency application to medically affected persons be given less than one hour before the scheduled application. However, an emergency application need not be postponed if after reasonable efforts by the farm operator actual notice cannot be given.

(k) Flags/signs raised under this section should be removed or lowered within 24 hours after the reentry interval expires. However, in no event shall such flags/signs be left posted for more than 72 hours after the reentry interval has expired. In the event that a pesticide application is not made when scheduled, the flag/sign may be left posted until after the reentry interval has expired.

(l) A person who has requested notice of a pesticide application under this section shall notify the farm operator promptly and in writing of any change of address or telephone number. Notice need not be given at any vacant structure or premises, or at any structure or premises which is not the place of residence or business of a person entitled to notice under this section.

(m) All complaints filed under this section shall be reviewed and investigated by the department in the same manner as any other complaints filed.

(n) The Texas Boll Weevil Eradication Foundation or other areawide pest control programs sponsored by a governmental entity must adhere to the following:

(1) For applications made by the foundation as part of its boll weevil eradication program or other areawide pest control program sponsored by a governmental entity, the entity making the application or causing the application to be made is responsible for meeting prior notification requirements of this subsection. The farm operator is responsible for accepting requests for and providing prior notification in accordance with this section for applications made by the farm operator.

(2) A request for notification of an application made by an entity covered by this subsection may be made by all of those persons listed in subsection (c) of this section. No request is necessary for prior notification of farm labor camps owned, managed or controlled by a farm operator and located on or within 1/4 mile of a field on which pesticides are to be applied by the foundation or other entity; provided that the farm operator is responsible for notifying the foundation or other entity of the presence of such labor camps.

(3) Requests made under this section shall be made in writing to the foundation or other entity or the farm operator and shall include all of the information required by subsection (d) of this section.

(4) The farm operator is responsible for notifying the foundation or other entity covered by this subsection of any requests for prior notification received by the farm operator relating to an application that will be made or caused to be made by the foundation or other entity. The information must be provided to the foundation or other entity within 24 hours of its receipt by the farm operator. The information may be provided:

(A) by telephone at a telephone number obtained from the department;

(B) by forwarding the written request to the foundation or other entity in the U.S. mail at a mailing address obtained from the department; or

(C) by any other reasonable means, as long as the information is forwarded within 24 hours of its receipt.

(5) Prior to the making of the first application in each calendar year, the foundation or other entity shall request that the farm operator notify it of any requests for prior notification already in effect for property on which the foundation or other entity will be making applications and of any future requests for prior notification on that property.

(6) A request for prior notification under this subsection shall be in effect through December 31 of the year that the request is received. The foundation or other entity shall begin notifying the requesting party of scheduled pesticide applications within 10 days of receipt of a request for notification.

(A) Notification shall be provided as follows:

(i) Notification may be given in writing, by raising a flag/sign in the manner provided at (g)(1)(A) of this section, in person, by telephone in English or, when appropriate, Spanish, or by other means mutually agreed upon by the requesting party and the foundation or other entity. This agreement must be in writing and a copy filed with the department. For purposes of providing notice to medically affected persons or to licensed day care centers, primary and secondary schools, hospitals, inpatient clinics and nursing homes, "notification in writing" means other than by mail such as by posting a written notice on the requester's front door or at the requester's place of business.

(ii) If the foundation or other entity is unable to reach a person entitled to notification under this section after making reasonable efforts, the foundation or other entity may immediately notify the department by telephone of the following information:

(I) the name and telephone number(s) of the foundation or other entity;

(II) the name and telephone number(s) of the requesting party;

(III) the location of the field scheduled to be treated;

(IV) the intended date and approximate time of the pesticide application; and

(V) the trade and common chemical name of the pesticide.

(iii) The department shall maintain a record of the information provided by the foundation or other entity for the duration of the notification request.

(iv) If the foundation or other entity telephones the department between 8:00 a.m. and 5:00 p.m., Monday-Friday, the department shall immediately attempt to telephone the requesting party and give notification of the scheduled application. A record showing the date and time of all such attempts shall be maintained by the department for the duration of the notification request.

(v) In addition to the methods of notification provided at this subparagraph, notification to farm labor camps may be provided in writing by placing a written notice on an on-site bulletin board or other central, on-site posting place which is readily accessible to labor camp residents.

(B) The notice shall include:

(i) the location of the field on which the application is to be made;

(ii) the intended date and approximate time of application;

(iii) the trade and common chemical name of the pesticide to be applied; and

(iv) who to contact for additional information.

(c) Notice shall be given no later than the day prior to a scheduled pesticide application.

(8) Advance notice need not be given on the day before an application when an immediate application is required and time does not reasonably allow the giving of notice on the day before the pesticide application. Notice of an emergency application shall be given:

(A) by the method selected in accordance with paragraph (6)(A) of this subsection as soon as reasonably possible before the application; or

(B) by telephone or in person to a medically-affected person as soon as reasonably possible, but not less than one hour before the application. However, an emergency application need not be postponed if after reasonable efforts by the foundation or other entity actual notice cannot be given.

(9) A person who has requested notice of a pesticide application under this section shall notify the foundation or other entity promptly and in writing of any change of address or telephone number.

§7.38. Forbidden Pesticide Practices.

(a) The pesticide applicator shall be responsible for complying with the following standards:

(1) Pesticides may not be applied if persons not involved with the application of the pesticide are lawfully present in the area to be treated.

(2) The applicator shall stop the application of a pesticide if any person not wearing appropriate protective clothing lawfully enters the area to be treated.

(b) It is a violation of these regulations for any person employed by a farm operator to knowingly enter an area to which pesticides have been applied and the restricted-entry interval has not expired or to which pesticides are being applied, except as permitted by the label or federal WPS.

§7.39. Sodium Fluoroacetate (Compound 1080) Livestock Protection Collar (LPC)–State-Limited-Use Requirements.

(a) Any and all pesticides and devices using the active ingredient sodium fluoroacetate for livestock predation control shall be classified as state-limited-use, pursuant to the Act, §76.003.

(b) In addition to the definitions set out in the Act, §76.001, and §7.1 of this title (relating to Definitions), the following terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) LPC applicator-A person who has obtained a license from the department as a private, commercial or noncommercial applicator or who has obtained a private applicator certificate and has fulfilled the requirements for livestock protection collar certification as set forth in this section. Private applicators may certify to use the livestock protection collar on property owned, leased, or rented by the person or the person's employer or under the person's general control. Employees of government agencies who apply collars in administration of official duties or persons that apply collars on their own or employer's property may obtain a livestock protection collar certification under a noncommercial license. Persons operating a business or employed by a business to apply livestock protection collars on the property of another for hire must obtain livestock protection collar certification under a commercial applicator license.

(2) Livestock protection collar (LPC) -A collar-like device which has been filled with the active ingredient sodium fluoroacetate (Compound 1080) to control predation.

(3) Registrant agent-A representative of a registrant. Each registrant agent must be a licensed pesticide dealer, a licensed private, commercial or noncommercial applicator certified in the livestock protection collar subcategory, and approved by the department to distribute livestock protection collars to approved LPC applicators.

(4) Collar pool agent-A person designated by the department to operate a livestock protection collar pool. Each collar pool agent must be a licensed pesticide dealer or county extension agent, a certified private applicator certified in the livestock protection collar subcategory, or a licensed private, commercial, or noncommercial applicator certified in the livestock protection collar subcategory and approved by the department to distribute livestock protection collars to approved LPC applicators.

(c) Distribution requirements. Registrants, registrant agents and collar pool agents distributing livestock protection collars must meet the following requirements.

(1) Each registrant must obtain a license under the Act, §76.071, and comply with the provisions of §7.20 of this title (relating to Application).

(2) Each registrant and registrant agent who distributes livestock protection collars must obtain a license as a private, commercial or noncommercial applicator with certification in the livestock protection collar subcategory and a pesticide dealer license. Each collar pool agent who distributes livestock protection collars must possess a private applicator certification and obtain certification in the livestock protection collar subcategory or obtain a license as a private, commercial, or noncommercial applicator with certification in the livestock protection collar subcategory and, except for county extension agents, a pesticide dealer license. Collars shall be distributed only by registrants or agents and only to certified livestock protection collar applicators.

(3) Livestock protection collars may not be distributed by registrants or agents to persons other than registrants or agents for the purpose of resale.

(4) Each registrant may designate registrant agents and shall file with the department written notice of the name, home address, address of distribution site, and telephone number of each agent. The registrant shall notify the department of any change in this information within ten days. The department shall notify the registrant in writing if the agent is approved or disapproved.

(5) Each livestock protection collar shall have a unique serial number clearly and firmly affixed to it.

(6) Registrants and agents shall dispose of livestock protection collars strictly in accordance with label directions.

(7) Registrants and agents shall distribute the forms prescribed by the department for use by LPC applicators with each distribution of livestock protection collars.

(8) Registrants and agents shall report to the department any incident or complaints of misuse involving a livestock protection collar.

(d) In order to be certified as an LPC applicator, the following criteria must be met.

(1) A person may obtain certification as either a private, commercial or noncommercial applicator by completing the livestock protection collar training, passing a test prescribed by the department and fulfilling the licensing requirements of the desired license type.

(2) In order to obtain certification as a licensed commercial LPC applicator, a person shall comply with the licensing requirements of §7.22 and §7.23 of this section (relating to Licensing of Applicators and Applicator Businesses Proof of Financial Responsibility), complete livestock protection collar training, pass a test prescribed by the department, and pay the fee prescribed by §7.20 of this section (relating to Application). The license expiration and renewal requirements of §7.25 of this title (relating to Expiration and Renewal of Licenses), apply to commercial LPC applicators.

(3) In order to obtain certification as a licensed noncommercial LPC applicator, a person shall comply with the licensing requirements of §7.22 of this title (relating to Licensing of Applicators), shall complete livestock protection collar training, pass a test prescribed by the department, and pay the fee prescribed by §7.22 of this title (relating to Licensing of Applicators);

(4) In order to obtain certification as a private LPC applicator, a person must possess a valid private applicator certificate or obtain a private applicator license in accordance with §7.22 of this title (relating to Licensing of Applicators) and complete the livestock protection collar training program and pass a test prescribed by the department. No testing fee will be collected from private applicators.

(5) All LPC applicators must recertify as required by §7.24 of this title (relating to Applicator Recertification). Each LPC applicator is responsible for giving written notice to the department of any change of address. Retraining and retesting may be required by the department for any LPC applicator who fails to comply with the use, recordkeeping, or other requirements of the department.

(e) LPC applicators must undergo training, including training in the following areas:

(1) the proper use of the livestock protection collar;

(2) the proper method of disposing of collars and contaminated materials;

(3) health and safety hazards, safe handling techniques, and emergency treatment in cases of accidental exposure;

(4) recordkeeping and reporting requirements;

(5) proper methods of identifying causes of predation; and

(6) approved methods of predator management.

(f) All LPC applicators shall comply with the label, including the use restrictions, when using the livestock protection collar. Copies of the label and applicator record forms shall be obtained with the purchase or transfer of any collar from a registrant or agent. Additional copies of the label and forms may be obtained from the department.

(g) Each registrant shall maintain records for the registrant and all registrant agents shall maintain records on forms prescribed by the department for at least two years which include:

(1) an inventory of Compound 1080 and an inventory of livestock protection collars including the serial number, size, type of straps, number of straps, and configuration for each collar. An annual production report shall be filed on forms prescribed by the department by each registrant by January 31 for the previous calendar year reporting on the number and type of livestock protection collars produced and distributed and on the quantity of Compound 1080 purchased and used;

(2) information on all distributions to applicators or agents, including:

(A) the date of distribution;

(B) the name, telephone number, address, and applicator license number of each LPC applicator who purchased or received a collar;

(C) the number of livestock protection collars distributed; and

(D) the serial number of each collar.

(3) A record of all distributions of collars by a registrant or agent shall be submitted to the department monthly. A report is not required for months in which a distribution does not occur.

(4) Each collar pool agent shall notify the department monthly of all distributions of collars and shall maintain records for at least two years, including:

(A) the date of distribution or receipt of collars;

(B) the name, telephone number, address, and applicator license number of each LPC applicator who purchased, transferred, or received a collar;

(C) the number of livestock protection collars distributed;

(D) the serial number of each collar; and

(E) the names and addresses of collar pool members.

(5) Each LPC applicator shall maintain records on the use of the collar on forms prescribed by the department. The records shall include:

(A) the serial number of the collar attached to livestock;

(B) the pasture(s) where collared livestock were placed;

(C) the dates of each attachment, inspection, and removal;

(D) the number and locations of livestock found with ruptured or punctured collars and the apparent cause of the damage;

(E) the number, dates, and approximate location of collars lost;

(F) the species, locations, and dates of all animals suspected to have been killed by collars;

(G) all suspected poisonings of humans, domestic animals or nontarget wild animals resulting from collar use and all other accidents involving the release of Compound 1080; and

(H) number of collars in storage.

(6) Each LPC applicator shall maintain a copy of collar use records for at least two years.

(7) Each registrant, agent, or LPC applicator shall report accidents involving any suspected or actual poisoning of threatened or endangered species, humans, domestic animals or nontarget wild animals to the department immediately (within one working day) by telephone.

(h) Instructions to noncertified applicators working under the supervision of a licensed LPC applicator. The licensed LPC applicator shall give appropriate verifiable instructions on the use of the collar to a noncertified person as required by §7.31 of this title (relating to Supervision) before the noncertified person may handle the collar. Licensed commercial LPC applicators must be physically present to supervise use of collars by noncertified applicators. Certified private applicators authorized to apply collars may not supervise any person using collars.

§7.40. M-44 Sodium Cyanide-State-Limited-Use Requirements.

(a) Any and all pesticides and devices using sodium cyanide as the active ingredient, including the M-44 device for livestock predation control, shall be classified as state-limited-use pesticides, pursuant to the Act, §76.003. However, this section shall not apply to the use of M-44 sodium cyanide by employees of the Texas Animal Damage Control Service when performing official duties and using M-44 cyanide capsules under the federal government registration.

(b) In addition to the definitions set out in the Act, §76.001 and §7.1 of this title (relating to Definitions), the following words and terms, when used in this section shall have the following meanings unless the context clearly indicates otherwise:

(1) Authorized dealer-A dealer licensed under the Act, §76.071, and specifically approved by the department to distribute M-44 sodium cyanide.

(2) M-44 applicator-A person who has obtained authorization from the department for the use of M-44 sodium cyanide.

(3) M-44 sodium cyanide-Includes the active ingredient sodium cyanide, sodium cyanide capsules, and any device loaded with sodium cyanide for use in livestock predation control.

(c) Dealers distributing M-44 sodium cyanide must meet the following requirements:

(1) All dealers who wish to distribute M-44 sodium cyanide must obtain written approval by the department. In order to obtain approval to handle M-44 sodium cyanide from the department, a person must obtain from the department a pesticide dealer's license to handle restricted-use and state-limited-use pesticides and regulated herbicides and complete special agreement forms to become an authorized dealer for the purpose of distributing M-44 sodium cyanide. An authorized dealer must meet the dealer requirements of the Act, §§76.071-76.077, the requirements of §7.20 of this title (relating to Application), and any additional federal requirements of the use restriction bulletin

(label) for M-44 sodium cyanide under EPA Registration Number 33858-2.

(2) An authorized dealer may distribute M-44 sodium cyanide only to M-44 applicators or registrants of M-44 sodium cyanide. M-44 sodium cyanide may not be distributed or transferred by an authorized a dealer to any person for the purpose of resale or transfer with the exception of registrants.

(3) The department will keep a list of authorized dealers and make it available to all certified applicators. Only dealers whose names appear on the list are authorized to receive or distribute M-44 sodium cyanide.

(4) Each authorized dealer must be or employ a person certified under this section.

(5) Each authorized dealer must maintain for a period of two years complete records of all transactions involving M-44 sodium cyanide, including:

(A) the amount of materials purchased by the authorized dealer and the date of purchase;

(B) the following information for each distribution:

(i) the date of distribution;

(ii) the name, address, applicator number, county, and telephone number of any M-44 applicator to whom M-44 sodium cyanide was distributed; and

(iii) the amount distributed to the approved applicator.

(6) Authorized dealers must ensure that any distribution of M-44 sodium cyanide is accompanied by a complete label. Authorized dealers must also provide to M-44 applicators the recordkeeping forms prescribed by the department. Authorized dealers may distribute sodium cyanide capsules only in boxes of ten each, in boxes of 25 each, or in boxes of 50 each.

(7) Authorized dealers must obtain the department's approval prior to purchasing any M-44 sodium cyanide.

(8) An authorized dealer must report to the department any incident or complaint of misuse involving M-44 sodium cyanide.

(d) Any person seeking to qualify as an M-44 applicator must possess a current private applicator certification or license, or

a commercial or noncommercial applicator license with certification in the predatory animal control subcategory, regulatory pest control category or demonstration and research category. All applicators must undertake training prescribed by the department and obtain certification for M-44 use.

(1) Training for M-44 applicators shall include the following:

(A) the proper use and treatment of the M-44 sodium cyanide;

(B) the proper method of disposing of M-44 sodium cyanide and related contaminated materials;

(C) safe handling techniques designed to reduce health and injury risks;

(D) recordkeeping requirements;

(E) proper methods of identifying causes of predation; and

(F) approved methods of predator control.

(2) All M-44 applicators must comply with the label including the use restrictions bulletin on M-44 sodium cyanide issued by the department (EPA Registration Number 33858-2) when using M-44 sodium cyanide. Copies of the use restrictions must be obtained with the purchase of each box of M-44 sodium cyanide. Additional copies of the bulletin and recordkeeping forms may be obtained from the department.

(e) Each applicator shall maintain records on forms prescribed by the department dealing with the placement of the device and the results of each placement. Such records shall include, but may not be limited to:

(1) the number of M-44 sodium cyanide devices in place;

(2) the location of each M-44 sodium cyanide device;

(3) the dates of each placement, inspection, and removal;

(4) the number and location of M-44 sodium cyanide devices which have been discharged and the apparent reason;

(5) species of animals taken; and

(6) all accidents or injuries involving humans, domestic animals, wildlife, or bodies of water.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711136
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–7541

♦ ♦ ♦

Subchapter E. Regulated Herbicides

4 TAC §§7.50–7.53

New §§7.50-7.53 are proposed under the Texas Agriculture Code, Chapter 76, as amended by House Bill 1144, 75th Legislature, 1997, including §76.004, which provides the department with the authority to regulate the use of pesticides and provides the department with the authority to carry out the provisions of Chapter 76; and Chapter 76, Subchapter G, which provides the department with the authority to adopt rules for the regulation of herbicide use.

The Texas Agriculture Code, Chapter 76 is affected by this proposal.

§7.50. General Requirements for Regulated Herbicide Applicators.

(a) The following requirements are applicable to persons applying regulated herbicides in regulated counties. No person shall apply regulated herbicides as defined in §7.30 of this title (relating to Classification of Pesticides), without first obtaining a spray permit for such application. A blanket permit may be issued to a licensed or certified applicator. The department may require a licensed or certified applicator who has obtained a blanket permit to submit a supplemental report of any regulated herbicide applied under the terms of the permit.

(1) All permits expire when the acreage for which the permit was granted has been sprayed, or 180 days after issuance, whichever occurs first.

(2) Applications of regulated herbicides by brush, mop, wick, basal treatment, or injection method are hereby exempt from the requirements of obtaining a permit.

(3) Applications by an applicator licensed by the Texas Structural Pest Control Board in turf and weed control and a nurseryman licensed by the department in turf weed control for structural pest control applications are exempt from the permit requirements of this section.

(4) All persons applying regulated herbicides to lawns are exempt from the permit requirements of this section.

(b) All spraying of regulated herbicides must conform to these requirements in a regulated county regardless of whether or not a permit is required.

(1) Spraying high volatile herbicides is prohibited when there are susceptible crops within a four-mile radius from any point of the land to be sprayed. Highly volatile herbicides include methyl, ethyl, butyl, isopropyl, octylamyl, and pentyl esters containing various concentrations expressed in pounds of acid equivalent per gallon.

(2) No person shall spray regulated herbicides when the wind velocity exceeds 10 miles per hour or as specified on the product label, if the label is more restrictive.

(3) The use of any turbine or blower-type ground application equipment to apply regulated herbicides is prohibited.

§7.51. Requirements for Special County Provisions.

(a) The department shall not accept for adoption any request for special county provisions which will, except as provided by and consistent with the Act, Subchapter G, and regulations adopted thereunder, either directly or indirectly:

(1) exempt applicators from obtaining spray permits, except during periods when susceptible vegetation is at a minimum;

(2) exempt applicators from recordkeeping requirements;

(3) exempt commercial applicators from requirements for proof of financial responsibility;

(4) prohibit the distribution of any herbicide; and/or

(5) require the department to inspect land prior to issuance of spray permits.

(b) The department may consider for adoption a request by a county to:

(1) regulate or prohibit methods of application;

(2) prohibit application of any regulated herbicide during any period of the year; and/or

(3) exempt from the provisions of Subchapter G of the Code, any portion of a county which can be identified by easily recognizable physical boundaries.

§7.52. Counties Regulated.

The following counties shall be subject to the provisions of the Act, Subchapter G, unless specifically excepted by provisions of §7.53 of this title (relating to County Special Provisions): Aransas, Archer, Austin, Bailey, Bell, Bexar, Brazoria, Brazos, Briscoe, Burleson, Calhoun, Cochran, Collin, Collingsworth, Culberson, Dallas, Dawson, Deaf Smith, Delta, Dickens, Dimmit, Donley, El Paso, Falls, Foard, Fort Bend, Gaines, Galveston, Hall, Hardin, Harris, Haskell, Hidalgo, Houston, Hudspeth, Hunt, Jackson, Jefferson, Kaufman, King, Knox, Lamar, Lamb, Liberty, Loving, McLennan, Martin, Matagorda, Midland, Milam, Motley, Newton, Orange, Parmer, Rains, Refugio, Robertson, Rockwall, Runnels, San Patricio, Travis, Tyler, Waller, Ward, Wharton and Wilbarger.

§7.53. County Special Provisions.

(a) Aransas. No permit is required for spraying regulated herbicides during the months of January and February.

(b) Archer.

(1) No permit is required for the application of regulated herbicides during the period of September 16th to May 9th of the following year.

(2) The application of the following regulated herbicides is prohibited during the regulated period beginning May 10th and ending September 15th of each year:

(A) 2,4,5-trichlorophenoxyacetic acid (2,4,5-T);

(B) the ester formulations of 2,4-dichlorophenoxyacetic acid (2,4-D); and

(C) 2-methyl-4-chlorophenoxyacetic acid (MCPA).

(3) The aerial application of polychlorinated benzoic acids and 2,4-D amine is prohibited during the regulated period except during the period beginning May 10th and ending May 20th of each year. Ground applications of polychlorinated benzoic acids and 2,4,-D amine may be made during the regulated period with the requirement of a permit.

(c) Austin.

(1) Only that portion of Austin County lying east and south of the line beginning at the point where State Highway 36 crosses the north county line, thence southerly along Highway 36 to FM 949; thence westwardly along FM 949 to the San Bernard River is regulated by Subchapter G of the Code and regulations adopted thereunder.

(2) Between March 15th and July 31st, in that portion of Austin County lying south of Interstate Highway 10, the following restrictions on the use of 2,4-D formulations shall apply:

(A) the application by aircraft is prohibited;

(B) the use of all ester formulations by any method is prohibited.

(d) Bailey.

(1) For the period beginning on October 1 of one calendar year through May 1 of the following calendar year, no permit will be required for the use of the regulated herbicides in that part of Bailey County defined by the following landmarks: south of Highway 746 from Texas/New Mexico state line extending east to Highway 214; then south on Highway 214 to the intersection of Highway 214 and Highway 746; then proceeding east on Highway 746 to the Bailey/Lamb County Line.

(2) Aerial application of regulated herbicides is prohibited in the area described in this subsection during the regulated period.

(3) For the period beginning on October 1 of one calendar year through April 15 of the following calendar year, no permit will be required for the use of regulated herbicides in that part of Bailey County defined by the following landmarks: north of 746 from Texas/New Mexico state line extending east to Highway 214, then south on Highway 214 to the intersection of Highway 214 and Highway 746; then proceeding east on Highway 746 to the Bailey/Lamb County line.

(4) Except as provided in these subsections, the aerial application of regulated herbicides is prohibited except that the aerial application of dicamba is allowed in the area described in this subsection during the regulated period. The aerial application of regulated herbicides may be used during the regulated periods provided the user obtains a permit from the department prior to use.

(e) Brazoria.

(1) For that portion of Brazoria County both north of State Highway 35 and west of Highway 288, the aerial application of all formulations of 2,4-D is prohibited between March 10 and September 15 of each year.

(2) In no case shall 2,4-D be used to treat any area that is nearer than two miles to any susceptible crop.

(3) For that portion of Brazoria County not included in paragraph (1) of this subsection, the aerial application of regulated herbicides is prohibited between March 25th and August 1st of each year.

(4) The use of high volatile herbicides is prohibited.

(5) Brazoria, Calhoun, Fort Bend, Jackson, Matagorda, and Wharton Counties, for purposes of this subsection, are considered as one unit, and paragraphs (1) and (3) of this subsection are not to be changed without a public hearing for the unit as a whole.

(f) Brazos. That portion of Brazos County lying east of the Brazos River and west of the following described line shall be regulated by the Act, Subchapter G and regulations adopted thereunder. The eastern boundary of the regulated area is as follows:

(1) beginning at the intersection of State Highway No. 6 and Old San Antonio Road (OSR), which point is on the north boundary line of Brazos County; thence in a southwesterly direction along OSR to its intersection with an unnamed gravel road approximately one mile north of FM 1687; thence easterly along FM 1687 to its intersection with a gravel road known as Stasny Road; thence southwesterly along Stasny Road to a 90 degree turn and continuing in a southeasterly direction to its intersection with State Highway 21 West; thence along Highway 21 in a westerly direction to its intersection with Jones Road; thence in a southeasterly direction along Jones Road to its intersection with FM 60; thence northeast along FM 60 to its intersection with the southwest property line of Easterwood Airport; thence southeast along the southwest line of Easterwood Airport to the most southerly corner of the airport property; thence in an easterly direction along the most direct line to the closest point on Dowling Road; thence northeast along Dowling Road to its intersection with an unnamed gravel road extending from Dowling Road to the town of Wellborn; thence southeast along said unnamed gravel road to its intersection with FM 2154 at the town of Wellborn; thence generally south and southeast along FM 2154 to its intersection with State Highway 6; thence southeast along State Highway 6 to its intersection with the Navasota River, which is the southern boundary of Brazos County;

(2) that portion of Brazos County lying east of the line described in paragraph (1) of this subsection shall be exempt from Subchapter G of the Code and regulations adopted thereunder.

(g) Briscoe.

(1) The aerial application of regulated herbicides shall be prohibited from May 1 through September 1 of each year in that portion of Briscoe County that lies above the Caprock Escarpment, such area to be designated as Zone 1.

(2) The aerial application of regulated herbicides will be allowed in Zone 1 between September 2 and October 1 of each year with the requirement of a permit.

(3) The aerial application of regulated herbicides shall be prohibited from May 1 through October 1 of each year in that portion of Briscoe County that lies below the Caprock Escarpment, such area to be designated as Zone 2.

(4) Only 2,4-D amine and dicamba may be applied by ground applications with the requirement of a permit.

(5) No permit is required for the application of regulated herbicides from October 2 through April 30 of the following year.

(h) Burleson.

(1) The application of regulated herbicides by aircraft is prohibited. In no case shall regulated herbicides be used to treat any area that is nearer than two miles to any susceptible crops.

(2) Between April 1 and September 15 of each year, the following restrictions on the use of 2,4-D formulations shall apply.

(A) Only amine formulations may be used with a boom-type sprayer for ground applications in that area beginning at Milam County line; thence south along FM Road 1362 to FM Road 166; thence east to FM Road 2039; thence south to FM 60; thence west on FM 60 to Davidson Creek; thence south along Davidson Creek to Washington County line to Brazos River; thence north along Brazos County line to Milam County line, the place of the beginning.

(B) Cluster nozzles are prohibited in the area designated in subparagraph (A) of this subsection.

(i) Calhoun.

(1) The aerial application of all formulations of 2,4-D is prohibited between March 10 and September 15 of each year.

(2) No permit is required for spraying regulated herbicides during the months of January and February of each year.

(3) Brazoria, Calhoun, Fort Bend, Jackson, Matagorda and Wharton Counties, for purposes of this subsection, are considered as one unit and paragraph (1) of this subsection is not to be changed without a public hearing for the unit as a whole.

(j) Cochran.

(1) The use of 2,4-D ester is prohibited for the period beginning April 25 and ending October 15 of each year.

(2) The aerial application of all regulated herbicides is prohibited for the period beginning April 25 and ending October 15 of each year.

(3) A permit for application of all regulated herbicides is required for the period beginning January 1 and ending on December 31 of each year.

(k) Collingsworth.

(1) The aerial application of regulated herbicides is allowed with the requirement of a permit between the dates of November 1 of one calendar year and April 15 of the following calendar year.

(2) Ground and aerial applications of regulated herbicides will be allowed with the requirement of a permit throughout the year in the northeast part of the county, identified with physical boundaries north of the Salt Fork of the Red River and east of U.S. Highway 83.

(3) Ground applications of 2,4-D amine will be allowed with the requirement for a permit throughout the county between the dates of April 16 and October 30 of each year.

(l) Dawson.

(1) No permit is required for the application of the regulated herbicides during the period from October 1 to April 15 of the following year.

(2) All ester formulations and/or other high volatile formulations of 2,4-D shall be prohibited.

(3) A permit is required for the ground application of 2,4-D amine and dicamba during the regulated period from April 16 through September 30 of each year.

(4) The aerial application of dicamba only is allowed with the requirement of a permit during the regulated period from April 16 through September 30 of each year.

(m) Deaf Smith. The use of all butyl ester formulations of 2,4-D and/or all high volatile formulations of 2,4-D is prohibited between April 15 and October 1 of each year.

(n) Delta. The aerial application of regulated herbicides is prohibited between April 15 and September 1 of each year.

(o) Dickens.

(1) No permit is required for the application of regulated herbicides during the period beginning September 1 and ending May 15 of the following year.

(2) The application of all regulated herbicides, with the exception of dicamba, is prohibited during the period beginning June 11 and ending August 31 of each year.

(3) This subsection applies only to that portion of Dickens County that lies below the caprock escarpment.

(p) Dimmit.

(1) Only that portion of Dimmit County within the area beginning at the intersection of the center line of U.S. Highway 83 and the Dimmit-Zavala County line; thence in a southerly direction following the center line of U.S. Highway 83, through Carrizo Springs, and Asherton, to its intersection with FM Road 190 East; thence in a northeasterly direction following the center line of FM Road 190 to its intersection with State Highway 85; thence in an easterly direction following the center line of State Highway 85 to its intersection with FM Road 65; thence following the center line of FM Road 65 to its intersection with the Dimmit- Zavala County line; thence in a westerly direction following the Dimmit-Zavala County line to the place of beginning is regulated by the Act, Subchapter G and regulations adopted thereunder.

(2) Aerial application of regulated herbicides in the regulated portion of Dimmit County is prohibited.

(q) Foard. That portion of Foard County within the area described as follows is regulated by the provisions of the Act, Subchapter G and regulations adopted thereunder, for the period beginning May 25 and ending October 10 of each year: all of that portion of Foard County lying east of a line which has its origin beginning at a point where the Pease River intersects the east boundary line of Section 509, Block A, H.& T.C.RR.C, survey, thence continuing southerly along the adjoining section lines ending at a point of intersection with the 345 KV transmission electric power lines, then, all of the portion of Foard County lying north of a line along the 345 KV transmission electric power lines extending easterly to the Wilbarger County line.

(r) Fort Bend.

(1) The aerial application of all formulations of 2,4-D is prohibited between March 10 and September 15 of each year.

(2) The application of high volatile herbicides is prohibited.

(3) In no case shall 2,4-D be used to treat any area that is nearer than two miles to any susceptible crop.

(4) Brazoria, Calhoun, Fort Bend, Jackson, Matagorda, and Wharton Counties, for purposes of this subsection, are considered one unit, and paragraph (1) of this subsection is not to be changed without a public hearing for the unit as a whole.

(s) Gaines.

(1) The application of all regulated herbicides is allowed without the requirement of a permit between the dates of October 1 and March 31 of the following year.

(2) A permit is required for the application of the regulated herbicides between the dates of April 1 to September 30 of each year.

(t) Hall. The application of regulated herbicides is prohibited between May 15 and October 15 of each year.

(u) Harris.

(1) The use of high volatile herbicides is prohibited.

(2) In no case shall 2,4-D be used to treat any area that is nearer than two miles to any susceptible crop.

(v) Haskell.

(1) No permit is required between November 1 and May 20 of the following calendar year.

(2) Aerial application of regulated herbicides is prohibited between June 2 and November 1 of each year.

(w) Hidalgo. The regulated portion of Hidalgo County is as follows:

(1) beginning at north county line and U.S. 281; thence south to FM 495; thence west to State Highway 107 (Conway Drive); thence south to U.S. 83 Expressway; thence west along U.S. 83 to west county line;

(2) all other lands in Hidalgo County are exempt from Subchapter G of the Code and regulations adopted thereunder.

(x) Houston. That portion of Houston County within the area described below is regulated by the provisions of the Act, Subchapter G and regulations adopted thereunder:

(1) beginning at a point where Bedias Creek enters Trinity River; thence north with meanders of the river to the point where Highway Number 7 crosses Trinity River; thence east with Highway Number 7 to city limits of Crockett; thence south to Farm Road Number 2110; thence to Pearson Chapel on Farm Road Number 2110; thence on Farm Road Number 3151 south to intersection of Farm Road Number 230, thence southwest on Farm Road Number 230 to Prison Farm entrance; thence south to Walker County line; thence with Walker and Houston County line to Trinity River and the place of beginning;

(2) all other lands in Houston County are exempt from the Act, Subchapter G and regulations adopted thereunder.

(y) Hudspeth.

(1) The use of all ester formulations of regulated herbicides is prohibited between the dates of April 1 and October 15 of each year.

(2) A permit is required for the application of the other formulations of regulated herbicides between the dates of April 1 and October 15 of each year.

(3) A permit is not required for the application of the regulated herbicides between the dates of October 16 to March 31 of the following year.

(z) Hunt.

(1) The aerial application of regulated herbicides shall be prohibited from April 15 through September 1 of each year.

(2) No permit is required for the application of regulated herbicides from September 1 of one calendar year through April 15 of the following calendar year.

(aa) Jackson.

(1) The aerial application of all formulations of 2,4-D is prohibited between March 10 and September 15 of each year.

(2) No permit is required for the application of regulated herbicides during the months of January and February of each year.

(3) Brazoria, Calhoun, Fort Bend, Jackson, Matagorda, and Wharton Counties, for purposes of this subsection, are considered one unit and paragraph (1) of this subsection is not to be changed without a public hearing for the unit as a whole.

(bb) King. Aerial application of regulated herbicides is prohibited between June 10 and October 15 of each year.

(cc) Knox. That portion of the county lying north of the Brazos River to its intersection with longitude 99 degrees 35'; thence north to latitude 33 degrees 42' going west to State Highway 6, then north to the Foard County line, west to King County line; thence south to the Brazos River, is exempt from Subchapter G of the Code and regulations adopted thereunder. All other portions of Knox County are required to comply with provisions of the Act, Subchapter G and regulations adopted thereunder, except that during the period between October 1 through March 31 of the following calendar year no permit will be required.

(dd) Lamar.

(1) That portion of Lamar County beginning at the Red River County line on State Highway 271N, which point is the east boundary line of Lamar County; thence on a northwesterly direction along 271 North to the town of Pattonville; thence in a westerly direction from Pattonville along Jefferson Road for a distance of two miles; thence south on unnamed oil top county road 0.9 mile to community of Shady Grove; thence in a westerly direction on unnamed oil top county road for one mile to the intersection of FM 905; thence south one mile on FM 905 to first unnamed oil top county road in community of Plainview; thence in a westerly direction on county road four miles to the town of Biardstown to intersection of FM 1497; thence northwesterly on FM 1497 0.3 mile to Hickory Creek; thence southeasterly on Hickory Creek to North Sulphur River, which is the south boundary line of Lamar County; thence easterly along the south county line to the southeast corner of the county; thence northerly along the east county line to its intersection with Highway 271 North, to the point of beginning is regulated by the Act, Subchapter G and regulations adopted thereunder.

(2) Aerial application of regulated herbicides is prohibited in the regulated portion of Lamar County between April 15 and September 1 each year.

(ee) Lamb. During the period between September 15 of one calendar year through April 1 of the following year, no permit will be required for the following regulated herbicides:

(1) 2-methyl-4 chlorophenoxyacetic acid (MCPA);

(2) polychlorinated benzoic acids; and

(3) either alone or in mixtures any of the herbicides listed in paragraph (1) and (2) of this subsection.

(ff) Liberty.

(1) The application of high volatile herbicides is prohibited.

(2) That portion of Liberty County lying south of Luce Bayou from the Harris County line to Highway 321, then the area south of a line from the point where Luce Bayou crosses Highway 321 due east to the Trinity River, then the area east of the Trinity River from this point north to the San Jacinto County line is exempt from the Act, Subchapter G and regulations adopted thereunder. All other portions of Liberty County are required to comply with provisions of the Act, Subchapter G and regulations adopted thereunder.

(gg) Matagorda.

(1) The aerial application of all formulations of 2,4-D is prohibited between March 10 and September 15 of each year.

(2) The application of high volatile herbicides is prohibited.

(3) In no case shall 2,4-D be used to treat any area that is nearer than two miles to any susceptible crop.

(4) Brazoria, Calhoun, Fort Bend, Jackson, Matagorda, and Wharton Counties, for purposes of this subsection, are considered as one unit, and paragraph (1) of this subsection is not to be changed without a public hearing for the unit as a whole.

(hh) Motley. No permit is required for the period of November 1 to May 14 of the following year.

(ii) Parmer. No permit is required in Parmer County for applications of regulated herbicides between November 1 and March 31 of the following year. However, the application of all ester formulations of 2,4-D is prohibited between the dates of April 15 and October 1 of each year.

(jj) Refugio.

(1) The application of the ester formulations of 2,4-D by any means is prohibited between the period of March 1 and September 15 of each year. The aerial application of any formulation of 2,4- D is prohibited between March 10 and September 15 of each year; except that if the county commissioners court determines that no cotton is growing on that date, in said county, permits may be issued until such time the county commissioners court determines that cotton is growing.

(2) No permit is required for the application of regulated herbicides during the months of January and February of each year.

(kk) Robertson.

(1) Persons in that portion of Robertson County, east of State Highway 6, are exempted from requirements of the Act, Subchapter G and regulations adopted thereunder.

(2) A permit is required for the application of regulated herbicides in that portion of Robertson County, west of State Highway 6 between the dates of April 1 and September 15 each year.

(ll) Runnels. That portion of Runnels County beginning on the west county line at the point of intersection with the Colorado River, east-southeasterly along the Colorado River to its intersection with U.S. Highway 83, thence north along U.S. Highway 83 to its intersection with the north county line, thence westerly along the north Runnels County line to the northwest corner of the county, thence southerly along the west county line to the Colorado River, the point of beginning, is regulated by the Act, Subchapter G and regulations adopted thereunder. In regulated areas, no permit is required from October 1 through May 25 of the following year. The application of ester formulations of regulated herbicides is prohibited from May 26 through September 30 of each year. The application of

other regulated herbicides will be allowed beginning May 26 through September 30 of each year provided that a spray permit is obtained prior to each application.

(mm) San Patricio. No permit is required during the period beginning September 1 and ending March 1 of the following year. Application of regulated herbicides during the period of March 2 through August 31 must be in compliance with the Act, Subchapter G and regulations adopted thereunder. Only boom-type equipment can be used, for ground applications with nozzle height not to exceed 24 inches and maximum pressure not to exceed 20 pounds per square inch. The use of 2,4-D amine herbicides must meet the following requirements for both ground and aerial applications: wind velocity of 0-5 mph downwind within 16 rows and upwind 8 rows;

(2) wind velocity of 6-10 mph downwind 1/8 mile and upwind 8 rows.

(nn) Wharton.

(1) The aerial application of all formulations of 2,4-D is prohibited in that portion of Wharton County east of the Colorado River between March 10 and September 15 of each year.

(2) The application of all formulations of 2,4-D by any method is prohibited during the period beginning March 10 and ending October 1 of each year, in that portion of Wharton County lying west of the Colorado River.

(3) The use of high volatile herbicides is prohibited.

(4) In no case shall 2,4-D be used to treat any area that is nearer than two miles to any susceptible crop.

(5) Brazoria, Calhoun, Fort Bend, Jackson, Matagorda, and Wharton Counties, for purposes of this subsection, are considered as one unit, and paragraph (1) of this subsection is not to be changed without a public hearing for the unit as a whole.

(oo) Wilbarger.

(1) No permit is required for the application of regulated herbicides during the period of September 16 to May 9 of the following calendar year.

(2) The application of the following regulated herbicides is prohibited during the regulated period beginning May 10 and ending September 15 of each year:

(A) 2,4,5-Trichlorophenoxyacetic Acid (2,4,5-T);

(B) Ester formulations of 2,4-Dichlorophenoxyacetic Acid (2,4-D);

(C) 2-Methyl-4-Chlorophenoxyacetic Acid (MCPA);

(3) The aerial application of polychlorinated benzoic acids and 2,4-D amine is prohibited during the regulated period except during the period of May 10 and ending May 20 of each year. Ground applications of polychlorinated benzoic acids and 2,4-D Amine may be made during the regulated period with the requirement of a permit.

(4) Research conducted by the Texas A&M University System under the auspices of brush and weed control, using all regulated herbicides, will be allowed during the regulated period. Aerial applications must provide a buffer zone of at least five statute miles from any susceptible crops, and wind velocity must not exceed 10 mph during application. Research will be allowed during the period beginning May 15 and ending September 15 of each year. The department shall be notified before the commencement of such research projects.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711137
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–7541

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Subchapter F. Enforcement

4 TAC §§7.60–7.62

New §§7.60-7.62 are proposed under the Texas Agriculture Code, Chapter 76, as amended by House Bill 1144, 75th Legislature, 1997, including §76.004, which provides the department with the authority to regulate the use of pesticides and provides the department with the authority to carry out the provisions of Chapter 76.

The Texas Agriculture Code, Chapter 76 is affected by this proposal.

§7.60. Enforcement.

In addition to the enforcement powers of the commissioner found in the Act, Subchapter H, the department may enter the premises of a commercial, non-commercial, or private applicator, nursery, greenhouse, a registrant or dealer during normal business hours to:

(1) examine records;

(2) inspect any apparatus subject to the Act; or

(3) inspect pesticide packaging, labels and labeling information for compliance with the Act.

§7.61. Stop Use, Stop Distribution or Removal Order.

(a) A written or printed order may be issued to any person in possession of a pesticide that has been determined to be in violation of the Act or these regulations.

(b) Upon receipt of an order under this section, a person may not use or distribute a pesticide for which the order was issued without approval of the department.

(c) Reasons for which a Stop Distribution, Stop Use or Removal Order may be issued include, but are not limited to, the following:

(1) a pesticide not currently registered with EPA and/or the department;

(2) a pesticide that does not bear a legible label;

(3) a pesticide that bears an adulterated or incomplete label;

(4) a pesticide in a broken, leaking or otherwise unsafe container;

(5) a pesticide that has been classified as a restricted-use or state-limited-use pesticide or a regulated herbicide that is being distributed without a current pesticide dealer license;

(6) a pesticide that has been classified as a restricted-use or state-limited-use pesticide or a regulated herbicide that is being used by a person that is not an appropriately licensed or certified applicator or working under the direct supervision of an appropriately licensed applicator;

(7) a pesticide whose use has been prohibited or cancelled; or

(8) a pesticide found to be in violation with any provision of the Act or these regulations.

(d) The custodian or owner of the pesticide shall maintain documentation on the disposition of a pesticide to which an order has been issued under this section.

(e) The department may require the person that has the responsibility for bringing the pesticide in compliance with the Act and these regulations to take any corrective action necessary to resolve the area of noncompliance.

§7.62. Complaint Investigation.

(a) Any person with cause to believe that any provision of the Act or this chapter has been violated may file a complaint with the department. The department will accept either written or oral notification, but may require that a complaint form be signed in order to conduct an investigation.

(b) Any person who has experienced or is alleging adverse effects from a pesticide application may file a complaint with the department. Such complaint shall be subscribed by the complaining party and set forth in detail the facts of the alleged violation.

(c) The department will investigate the complaint and make a full written report.

(d) This report will be made available to the parties concerned upon written request to the extent provided under the Texas Government Code, Chapter 552.

(e) The department shall, as soon as possible, notify the applicator(s) believed to be responsible for the complaint and the owner or lessee of the land where the application occurred.

(f) The department will not estimate monetary losses sustained.

(g) No finding of violation by the department will be premised solely on the uncorroborated statements of an anonymous or unidentified complainant, but all such complaints will be investigated routinely. For each such complaint, the department will determine the extent of investigation which is appropriate to address the complaint.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711138
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture

Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–7541

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Subchapter G. Penalties

4 TAC §§7.70–7.71

New §§7.70-7.71 are proposed under the Texas Agriculture Code, Chapter 76, as amended by House Bill 1144, 75th Legislature, 1997, including §76.004, which provides the department with the authority to regulate the use of pesticides and provides the department with the authority to carry out the provisions of Chapter 76.

The Texas Agriculture Code, Chapter 76 is affected by this proposal.

§7.70. Penalties.

(a) The Code, §12.020, which provides for the assessment of administrative penalties, applies to a person who violates the Act or these regulations. Failure to pay an administrative penalty assessed by a final order of the department is a violation of these regulations. Failure to pay a final civil penalty judgment in which express findings of a violation are made and which was entered pursuant to the Act shall also constitute a violation of these regulations.

(b) It shall be a violation for a person to distribute restricted-use or state-limited-use pesticides or regulated herbicides without a current pesticide dealer license in accordance with the Act, Subchapter D (concerning licensing of dealers).

§7.71. Use Inconsistent with Label Directions.

It shall be a violation for any person to use or cause to be used a pesticide in a manner inconsistent with its label or labeling. Use inconsistent with the label includes, but is not limited to:

(1) applications at sites, rates, concentrations, intervals, or under conditions not specified in the labeled directions, except:

(A) applying a pesticide at any dosage, concentration, or frequency less than that specified on the labeling unless the labeling specifically prohibits deviation from the specified dosage, concentration, or frequency;

(B) applying a pesticide against any target pest not specified on the label or labeling if the application is to the crop, animal, or site specified on the labeling, unless the department or EPA has required that the labeling specifically state that the pesticide may be used only for the pests specified on the labeling after the department or EPA has determined that the use of the pesticide against other pests would cause an unreasonable, adverse effect on the environment;

(C) employing any method of application not prohibited by the labeling unless the labeling specifically states that the product may be applied only by the methods specified on the labeling or unless prohibited by law or regulation;

(D) mixing a pesticide or pesticides with a fertilizer when such mixture is not prohibited by the labeling;

(E) when a pesticide is applied in conformance with an approved experimental use permit (EUP);

(F) when a pesticide is applied in conformance with an approved emergency exemption granted by EPA to a federal or state agency;

(G) when a pesticide is applied in conformance with an approved Special Local Need registration;

(H) when applied in any situation receiving prior written approval from EPA.

(2) tank mixing of pesticides, or using application techniques, or equipment prohibited by the label;

(3) failure to observe reentry intervals, preharvest intervals, grazing restrictions, or worker protection requirements:

(A) it is the responsibility of the person in control of the commodity or site treated to be knowledgeable of and comply with the requirements of this paragraph;

(B) if a commercial applicator furnishes the pesticide, it is the commercial applicator's responsibility to notify the person in control of the commodity or site treated of the requirements of this section that pertain to restricted-entry intervals, preharvest intervals, grazing restrictions, or worker protection requirements, prior to, or at the time of treatment.

(4) improper storage or disposal of the pesticide or its container.

(5) it shall be a violation for any person to use or cause to be used a pesticide in a manner inconsistent with any permit, emergency exemption or special local needs registration issued by the department or EPA.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711139
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–7541

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Chapter 11. Herbicide Regulations

4 TAC §§11.1–11.11

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Agriculture or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Agriculture (the department) proposes the repeals of §§11.1-11.11, concerning Herbicide Regulations. House Bill 1144, 75th Legislature, 1997, consolidated the Texas Agriculture Code Chapters 75 (the Texas Herbicide Law) and Chapter 76 (the Texas Pesticide Law) requiring the consolidation of the current regulations adopted under those chapters. The repeal of the department's Pesticide Regulations, found at Chapter 7 of this title, and a new Chapter 7 are also being proposed as a separate submission to make these chapters consistent with the changes made by the 75th Legislature. The repeals of §§11.1-11.11 will allow for proposal of a clearer, more concise set of regulations

Donnie Dippel, Assistant Commissioner for Pesticide Programs, has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Dippel also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be a more concise regulation with clearer terminology. There will be no effect on small businesses. There is no anticipated economic costs to persons who are required to comply with the repeal as proposed.

Comments on the proposal may be submitted to Donnie Dippel, Assistant Commissioner for Pesticide Programs, P.O. 12847, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The repeals are proposed under the Texas Agriculture Code, Chapter 76, Subchapter G, as enacted by House Bill 1144, 75th Legislature, 1997, which provides the department with the authority to adopt rules for the regulation of herbicide use; and the Texas Agriculture Code, §76.004 which provides the department with the authority to promulgate rules to carry out the provisions of Chapter 76.

The Texas Agriculture Code, Chapter 76, is affected by the repeal.

§11.1. Counties Regulated.

§11.2. County Special Provisions.

§11.3. Regulated Herbicides.

§11.4. Definitions.

§11.5. Dealers.

§11.6. General Requirements for Applicators.

§11.7. Registration and Specification of Equipment.

§11.8. Complaint Investigation.

§11.9. Requirements for Special County Provisions.

§11.10. Penalties.

§11.11. Expiration Provision.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711140
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–7541

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TITLE 7. BANKING AND SECURITIES

Part I. State Finance Commission

Chapter 3. Banking Section

The Finance Commission of Texas (the commission) proposes amendments to §3.21, concerning bank call reports, §3.92, concerning user safety at unmanned teller machines, and §3.111, concerning confidential information. The amendments are presented separately by subchapter under a common preamble as required by the *Texas Register*.

The proposed amendments will revise the manner in which statutory source law is cited to conform with the recent codification of the source law into the Finance Code, effective September 1, 1997. In the event of a simple citation change from source law to the Finance Code, the change is being made administratively, without the necessity of a proposed amendment and adoption. In the case of §§3.21, 3.92, and 3.111, substantial wording and organizational changes are required to change citations. No substantive changes will occur as a result of the amendments.

Everette D. Jobe, General Counsel, Texas Department of Banking, has determined that for the first five-year period the section as proposed will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Jobe also has determined that for each year of the first five-year period the section as proposed will be in effect, the public benefit anticipated as a result of the amendments will be conformity of the sections with underlying source law and consequent reduction of potential public confusion. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

Subchapter B. General

7 TAC §3.21

The amendment is proposed pursuant to the Finance Code, §31.003(a), which authorizes the commission to adopt rules "to accomplish the purposes of this subtitle and Chapters 11, 12, and 13, including rules necessary or reasonable to ... implement and clarify this subtitle and Chapters 11, 12, and 13 ...." Prior to September 1, 1997, identical rulemaking authority resides at Texas Civil Statutes, Article 342-1.012, the source law codified into Finance Code, §31.003.

As required by the Finance Code, §31.003(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

The Finance Code, §§31.108 and 31.302-31.308, is affected by the proposed amendment.

§3.21. Bank Call Reports.

(a) Definitions. The following words and terms, when used in this section shall have the following meanings, unless the context clearly indicates otherwise.

(1) [Act–Texas Civil Statutes, Articles 342-1.001 et seq (Texas Banking Act, §1.001 et seq).]

[(2)] Commissioner–The Banking Commissioner of Texas.

(2) [(3)] Call report–A report of condition and income in FFIEC form as required by 12 United States Code (USC), §1817, or a report of financial condition and results of operations of a state bank as mandated by the commissioner pursuant to the **Finance Code, §31.108** [Act, §2.009].

(3) [(4)] Department–The Texas Department of Banking.

(4) [(5)] FDIA–The Federal Deposit Insurance Act (12 USC, §1811 et seq).

(5) [(6)] FDIC–The Federal Deposit Insurance Corporation.

(6) [(7)] FFIEC–The Federal Financial Institutions Examination Council.

(7) [(8)] State bank–A bank as defined by the **Finance Code, §31.002(a)(50)** [Act, §1.002(a)(51)].

(b)-(f) (No change.)

(g) Confidentiality. Pursuant to the **Finance Code, §31.301** [Act, §2.101], call reports filed under subsections (b) or (c) of this section are public information to the extent that such reports are considered public records under the FDIA, implementing federal regulations, and FFIEC guidelines, and may be published or otherwise disclosed to the public. Special call reports filed pursuant to subsection (d) of this section and non-public portions of call reports filed pursuant to subsections (b) or (c) of this section are confidential, subject only to such disclosure as may be permitted by the **Finance Code, §§31.302 - 31.308** [Act, §§2.102-2.108], or by §3.111 of this title (relating to Confidential Information).

(h) Penalties for failure to file or for filing a report with false or misleading information. A state bank which fails to make, file, or submit a call report or a special call report or fails to timely file a call report or special call report as required by this section is subject to a penalty not exceeding $500 a day to be collected by the attorney general on behalf of the commissioner. Any state bank which makes, files, submits or publishes a false or misleading call report or special call report is subject to an enforcement action pursuant to the **Finance Code, Chapter 35** [Act, Chapter 6].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711181
Everette D. Jobe
General Counsel
State Finance Commission
Proposed date of adoption: October 24, 1997
For further information, please call: (512) 475-1300

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Subchapter E. Banking House and Other Facilities

7 TAC §3.92

The amendment is proposed under the authority of Finance Code, §59.310, which requires the commission to adopt rules regarding enforcement and implementation of the Finance Code, Chapter 59, Subchapter D. Prior to September 1, 1997, identical rulemaking authority resides in Texas Civil Statutes, Article 342-903d, §7(a), as enacted by Acts 1995, 74th Legislature, Chapter 647.

Finance Code, Chapter 59, Subchapter D, is affected by the proposed amendment.

§3.92. User Safety at Unmanned Teller Machines.

(a) Definitions. Words and terms used in this subchapter that are defined in the **Finance Code, §59.301** [ATM User Safety Act, §1], have the same meanings as defined in the **Finance Code** [ATM User Safety Act. The following words and terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise].

[(1) Access device-A card, code, or any combination thereof, or other means of access, to a customer's account at a financial institution, that may be used by the customer to initiate a transaction at an ATM.]

[(2) ATM-A machine, sometimes referred to as an unmanned teller machine, other than a night depository, a telephone, or a customer convenience terminal, capable of being operated solely by a customer, by which a customer may communicate to the financial institution:]

[(A) a request to withdraw money directly from the customer's account or from the customer's account pursuant to a line of credit previously authorized by the financial institution for the customer;]

[(B) an instruction to deposit funds into the customer's account with the financial institution;]

[(C) an instruction to transfer funds between one or more accounts maintained by the customer with the financial institution but not as between the customer's account and an account maintained in the financial institution or in some other financial institution by some other customer;]

[(D) an instruction to apply funds against an indebtedness of the customer to the financial institution;]

[(E) a request for information concerning the balance of the account of the customer with the financial institution; or]

[(F) any other form of transaction a customer may conduct at an ATM using an access card.]

[(3) ATM User Safety Act-Texas Civil Statutes, Article 342-903d, as enacted by Act of May 27, 1995, 74th Legislature, Chapter 647, 1995 Texas Session Law Service 3528.]

[(4) Customer convenience terminal-A particular kind of unmanned teller machine, the use of which does not involve personnel of a financial institution by which:]

[(A) a customer of a financial institution can authorize and effect the electronic transfer of funds from the customer's account at the financial institution in order to obtain cash or purchase or rent or pay for goods or services or both; and]

[(B) the merchant can ascertain that the transaction has been completed and the funds have been or will be transferred to the merchant's account at the merchant's financial institution.]

[(5) Department-The Texas Department of Banking.]

(b) Measurement of candle foot power. For purposes of measuring compliance with the **Finance Code, §59.307** [ATM User Safety Act, §3], candle foot power should be determined under normal, dry weather conditions, without complicating factors such as fog, rain, snow, sand or dust storm, or other similar condition.

(c) Leased premises.

(1) Noncompliance by landlord. Pursuant to the **Finance Code, §59.306** [ATM User Safety Act, §3(c)], the landlord or owner of property is required to comply with the safety procedures of the **Finance Code, Chapter 59, Subchapter D,** [ATM User Safety Act] if an access area or defined parking area for an **unmanned teller machine** [ATM] is not controlled by the owner or operator of the **unmanned teller machine** [ATM]. If an owner or operator of an **unmanned teller machine** [ATM] on leased premises is unable to obtain compliance with safety procedures from the landlord or owner of the property, the owner or operator shall notify the landlord in writing of the requirements of the **Finance Code, Chapter 59, Subchapter D,** [ATM User Safety Act] and of those provisions for which the landlord is in noncompliance.

(2) Enforcement. Noncompliance with safety procedures required by the **Finance Code, Chapter 59, Subchapter D,** [ATM User Safety Act] by a landlord or owner of property after receipt of written notification from the owner or operator constitutes a violation of the **Finance Code, Chapter 59, Subchapter D** [Act], which may be enforced by the Texas Attorney General.

(d) Safety evaluations.

(1) The owner or operator of an **unmanned teller machine** [ATM] shall evaluate the safety of each machine on a basis no less frequently than annually.

(2) The safety evaluation shall consider at the least the factors identified in the **Finance Code, §59.308** [ATM User Safety Act, §4].

(3) The owner or operator of the **unmanned teller machine** [ATM] may provide the landlord or owner of the property with a copy of the safety evaluation if an access area or defined parking area for an **unmanned teller machine** [ATM] is not controlled by the owner or operator of the machine.

(e) Notice.

(1) Existing accounts. No later than January 1, 1996, an issuer of access devices shall furnish its customers with a notice of basic safety precautions that each customer should employ while using an **unmanned teller machine** [ATM]. The notice may be included as a statement stuffer with another mailing or may be delivered personally or mailed to each customer whose mailing address is in this state and who has been issued an access device.

(2) New access devices. An issuer of access devices shall furnish its customer with a notice of basic safety precautions at the time the initial disclosure of terms and conditions is provided to such customer.

(3) Annual notice. **An** [After January 1, 1996, an] issuer of access devices shall furnish its customers with a notice of basic safety precautions on a basis no less frequently than annually.

(4) Content. The notice of basic safety precautions required by this subsection must be provided in written form which can be retained by the customer and may include recommendations or advice regarding:

(A) security at walk-up **unmanned teller machines** [ATMs];

(B) security at drive-up **unmanned teller machines** [ATMs];

(C) protection of code or personal identification numbers;

(D) procedures for lost or stolen **access devices** [cards];

(E) reaction to suspicious circumstances;

(F) safekeeping and disposition of **unmanned teller machine** [ATM] receipts, such as the inadvisability of leaving an **unmanned teller machine** [ATM] receipt near the **unmanned teller machine** [ATM];

(G) the inadvisability of surrendering information about the customer's access device over the telephone;

(H) safeguarding and protecting of the customer's access device, such as a recommendation that the customer treat the access device as if it was cash;

(I) protection against **unmanned teller machine** [ATM] fraud, such as a recommendation that the customer compare **unmanned teller machine** [ATM] receipts against the customer's monthly statement; and

(J) other recommendations that the issuer reasonably believes are appropriate to facilitate the security of its **unmanned teller machine** [ATM] customers.

(f) Video surveillance equipment. Video surveillance equipment is not required to be installed at all **unmanned teller machines** [ATMs]. The owner or operator must determine whether video surveillance or unconnected video surveillance equipment should be installed at a particular **unmanned teller machine** [ATM] site, based on the safety evaluation required under the **Finance Code, §59.308** [ATM User Safety Act, §4]. If an owner or operator determines that video surveillance equipment should be installed, the owner or operator must provide for selecting, testing, operating, and maintaining appropriate equipment.

(g) **Unmanned teller machines** [ATMs] located in a bank vestibule. The provisions of the **Finance Code, Chapter 59, Subchapter D,** [ATM User Safety Act] and this section are applicable to an **unmanned teller machine** [ATM] located in a bank vestibule if there is 24 hour access to the vestibule from outside the building.

(h) Certification of Compliance. The security officer of each depository shall certify compliance with the **Finance Code, Chapter 59, Subchapter D,** [ATM User Safety Act] and this **section** [regulation] on a basis no less frequently than annually.

[(i) Mandatory Compliance Date. Subject to the exemption provided by the ATM User Safety Act, §6, compliance with the safety requirements of the ATM User Safety Act and this section is required not later than September 1, 1996.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711180
Everette D. Jobe
General Counsel
State Finance Commission
Proposed date of adoption: October 24, 1997
For further information, please call: (512) 475-1300

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Subchapter F. Access to Information

7 TAC §3.111

The amendment is proposed pursuant to various rulemaking authority under the Finance Code. The Finance Code, §31.304(a), provides that a financial institution, affiliate or service provider that receives confidential information from the department may not disclose that information to anyone who is not officially connected to the recipient, "except as authorized by rules adopted under this subtitle." The Finance Code, §31.305, provides that discovery of confidential information pursuant to subpoena from a person subject to the Finance Code, Chapter 31, Subchapter D, "must comply with rules adopted under this subtitle." The Finance Code, §31.305, also provides that the rules may restrict release to confidential information that is directly relevant to the legal dispute at issue and that the rules may require a court-issued protective order, in form and under circumstances the rules specify, prior to release. The Finance Code, §31.003(a), provides that the commission may adopt rules "to accomplish the purposes of this subtitle," including rules that "implement and clarify" it or "preserve or protect the safety and soundness of banks." Prior to September 1, 1997, identical rulemaking authority resides at Texas Civil Statutes, Articles 342-1.012, the source law codified into Finance Code, §31.003.

Pursuant to the new Texas Trust Company Act, enacted by Act of May 20, 1997, House Bill 1870, 75th Legislature, effective September 1, 1997, the finance commission will in time enact similar rules applicable to trust companies under the authority of the Texas Trust Company Act, §§1.003, 2.104, and 2.105. Until new regulations are proposed and adopted, trust companies are required to comply with all regulations applicable to banks to the extent compatible with the Texas Trust Company Act, including §3.111.

As required by the Finance Code, §31.003(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of

state banks and the state bank system, and allow for economic development within this state.

The Finance Code, §§31.108, 31.301-31.308, 32.004, 33.002, 35.201, 35.012, 35.105, 35.204, and 36.224; and the Texas Trust Company Act, §§2.101-2.108, are affected by the proposed amendment.

§3.111. Confidential Information.

(a) Policy. The Texas Department of Banking (the department) is committed to the concept of open state government. As a regulator of financial institutions, however, the department recognizes the mandate of the legislature to balance the competing interests of the need of financial institutions for confidentiality regarding their financial condition and business affairs with the general public's need for information. The legislature has determined that confidential information, with limited exceptions, should not be disclosed. See **Finance Code, Chapter 32, Subchapter D** [Texas Civil Statutes, Articles 342-2.101 et seq (the Act, §§2.101 et seq)]. Inappropriate disclosures can result in substantial harm to financial institutions and to those persons and entities (including other financial institutions) that have relationships with them. In accordance with the historical availability of records of financial institutions and the sound public policy that generally protects them, non-disclosure under this section protects the stability of such institutions by preventing disclosures that could adversely impact financial institutions. For example, the department may criticize a bank in an examination report for a financial weakness that does not currently threaten the solvency of the bank. If improperly disclosed, the criticism can lead to adverse impacts such as the possibility of bank "runs," short-term liquidity problems, and volatility in costs of funds, which in turn can exacerbate the problem and cause the failure of the bank. Bank failures lead to reduced access to credit and greater risk to depositors. Further, specific loans may be criticized in an examination report, and confidentiality of the information protects the financial privacy of customers. Finally, protecting confidential information from disclosure facilitates the free exchange of information between the financial institution and the regulator, encourages candor, and promotes regulatory responsiveness and effectiveness. Information that does not fall within the meaning of confidential information as defined in this section may be confidential under other definitions and controlled by other laws, and is not subject to this section.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) [Act-The Texas Banking Act, Texas Civil Statutes, Articles 342-1.001 et seq (the Texas Banking Act, §1.001 et seq).]

[(2)] Affiliate-A company that directly or indirectly controls, is controlled by, or is under common control with a bank or other company.

(2) [(3)] Confidential information-Written and oral information obtained directly or indirectly by the department relative to the financial condition or business affairs of a financial institution, or a present, former, or prospective shareholder, participant, officer, director, manager, affiliate, or service provider of a financial institution, whether obtained through application, examination, or otherwise, and all related files and records of the department, regardless of the form of the information when obtained or as held by the department or when the department first obtained it, and whether or not the information is part of the department's official files or records. The term does not include the public portions of call reports and profit and loss statements.

(3) [(4)] Financial institution-As defined in the **Finance Code, §31.002(a)(25)** [Act, §1.002(a)(25)]. For purposes of this section only, the term includes a trust company incorporated under **the Texas Trust Company Act, as enacted by Act of May 20, 1997, House Bill 1870, 75th Legislature, effective September 1, 1997, or a predecessor statute** [Texas Civil Statutes, Articles 342-1101 et seq], and a foreign bank agency licensed under the **Finance Code, §39.001 et seq** [Act, §§9.001 et seq].

(4) [(5)] Governmental agency-Another department of this state, another state, the United States, a foreign sovereign state, or any related agency or instrumentality.

(5) [(6)] Court-A court of law or equity or other adjudicatory tribunal with jurisdiction to issue a subpoena or other legal process for the production of documents, including a government agency exercising adjudicatory functions and an alternative dispute resolution mechanism, voluntary or required, under which a party may compel the production of documents.

(c) Authority to receive, hold or disclose confidential information. Authority to disclose confidential information to an individual, business, or governmental agency under this section constitutes authority to disclose it to the appropriate person officially connected to such individual, business, or governmental agency that has a need to know the information in connection with the discharge of official responsibilities and authority for the person who is officially connected to such individual, business, or governmental agency to receive such information. A person officially connected to a financial institution includes its holding company, officer, director, manager, attorney, auditor, independent auditor, employee, and a person reasonably designated as officially connected with the financial institution by resolution duly adopted by the board of directors of the financial institution. A financial institution or its service provider, or affiliate may disclose confidential information, other than as specifically mentioned, to a non-employee, such as its agent, bonding company, or a prospective acquirer, only pursuant to board resolution designating the person or entity as officially connected with the financial institution, affiliate, or service provider. The financial institution, affiliate, or service provider may not disclose confidential information to a shareholder or participant that is specifically denied to such person under the **Finance Code, §31.308** [Act, §2.108]. Only a person to whom confidential information has been released pursuant to lawful authority may disclose that information to another, and all such further disclosures must be in accordance with the **Finance Code** [Act] and this section.

(d) Disclosure prohibited.

(1) Pursuant to the **Finance Code, §31.301** [Act, §2.101], and *Stewart v. McCain* , 575 S.W.2d 509 (Tex. 1978), the department possesses an absolute privilege against disclosure of confidential information held by the department. Except as provided by the **Finance Code, Title 3, Subtitle A** [Act] and rules adopted under the **Finance Code** [Act], the finance commission, a member of the finance commission, the banking commissioner, or an employee or agent of the department may not directly or indirectly disclose confidential information, whether voluntarily or pursuant to subpoena or other legal process. Confidential information is discoverable from the department under this section only pursuant to a protective order under subsection (f) of this section in a case in which

the department is a party other than as intervenor under this section. Pursuant to the **Finance Code, §31.306** [Act, §2.106], and notwithstanding any other provision of this section authorizing the release of confidential information, the banking commissioner may refuse to release information or records in the custody of the department if, in the opinion of the banking commissioner, release of the information or records might jeopardize an ongoing investigation by the department or other governmental agency of potentially unlawful activities.

(2) Except as provided by the **Finance Code, Title 3, Subtitle A**, [Act] and this section, a financial institution, its service provider, or its affiliate may not disclose confidential information received from the department. Confidential information includes an examination report of, correspondence with, and formal and informal actions of the department taken against the financial institution, service provider, or affiliate.

(e) Exceptions to non-disclosure.

(1) Disclosures by the department. Confidential information disclosed by the department pursuant to an exception to disclosure remains the confidential property of the department. The department may:

(A) disclose confidential information to the finance commission and other governmental agencies as provided by the **Finance Code, §31.302 and §31.303** [Act, §2.102 and §2.103];

(B) publish final removal, prohibition, and cease-and-desist orders and information regarding the existence of a cease-and-desist order as provided by the **Finance Code, §35.012** [Act, §6.012];

(C) release employment information as provided by the **Finance Code, §31.307** [Act, §2.107];

(D)-(E) (No change.)

(F) forward to a court of proper jurisdiction, subject to any existing administrative protective order, the record of an administrative hearing under appeal that contains confidential information. In the event an administrative protective order does not exist, the department or another party shall file a motion with the court for a protective order consistent with the terms of subsection (f)(4) of this section prior to filing the administrative record. Discretion of the banking commissioner or finance commission to vacate an administrative protective order entered under §9.22 of this title (relating to **Protective Orders and Motions to Compel** [In Camera Materials]) ceases at the time the appeal is filed.

(2) (No change.)

(3) Disclosures of certain information.

(A) (No change.)

(B) Records of a failed financial institution. Subject to an appropriate finding of the banking commissioner under this subparagraph, the department may release confidential information in or related to the records of a failed financial institution. Release may not occur under this subparagraph earlier than three years after the date such financial institution failed. Information subject to release must pertain only to the condition of the financial institution and cannot include confidential customer information, absent customer consent, or information made confidential by laws other than the **Finance Code, Title 3, Subtitle A,** [Act] or this section. Confidential information, as limited herein, may be released if the banking commissioner, in the exercise of discretion, finds that:

(i)-(iii) (No change.)

(C) (No change.)

(f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711179
Everette D. Jobe
General Counsel
Texas Department of Banking
Proposed date of adoption: October 24, 1997
For further information, please call: (512) 475-1300

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Chapter 4. Currency Exchange

7 TAC §4.3

The Finance Commission of Texas (the commission) proposes an amendment to §4.3, concerning reporting and recordkeeping.

The proposed amendment to §4.3(i) will clarify the original intent of the section that only currency transmission licensees may keep records based on a transaction threshold of $3,000 under federal law rather than the more strict threshold of $1,000 under state law. Currency exchange licensees must continue to comply with the requirements of §4.3(e)(1). In addition, the amendments will revise the manner in which statutory source law is cited to conform with the recent codification of the source law into the Finance Code, effective September 1, 1997.

Stephanie Newberg, Director, Special Audit Division, Texas Department of Banking, has determined that for the first five-year period the section as proposed will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Newberg also has determined that for each year of the first five-year period the section as proposed will be in effect, the public benefit anticipated as a result of the amendment will be clarification of ambiguous language to better enforce state laws designed to prevent money laundering. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted in writing to Stephanie Newberg, Director, Special Audit Division, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The amendment is proposed pursuant to the Finance Code, §153.002(1), which authorizes the commission to adopt rules "necessary to implement this chapter, including ... recordkeeping and reporting requirements of a license holder." Prior to September 1, 1997, identical rulemaking authority resides in Texas Civil Statutes, Article 350, §7.

Finance Code, Chapter 153, is affected by the proposed amendment.

§4.3. Reporting and Recordkeeping.

(a) For purposes of this section, a "currency business" refers to a person that engages in or has engaged in currency exchange or currency transmission transactions, whether the person is licensed under **the Finance Code, Chapter 153** [Texas Civil Statutes, Article 350 (the Act)], or is exempt from licensing under the **Finance Code, §153.117(a)(2)** [Act, §3(b)].

(b) (No change.)

(c) Currency businesses shall comply with all federal laws and regulations affecting their operations under the **Finance Code, Chapter 153,** [Act] and shall maintain records of all filings made pursuant to and documentation required under all applicable federal laws and regulations, including the requirements set forth in 31 United States Code, §5313 and 31 Code of Federal Regulations (CFR), Part 103.

(d) (No change.)

(e) In addition to the records required to be maintained under subsections (b), (c), and (d) of this section, currency businesses shall keep the following records:

(1)-(2) (No change.)

(3) A currency business shall maintain a log or logs of its activities under the **Finance Code, Chapter 153** [Act] for each calendar month containing the following information for each transaction:

(A)-(F) (No change.)

(f) (No change.)

(g) Failure to comply with this section constitutes grounds for denial, revocation, or suspension of a license as provided in the **Finance Code, §153.115** [Act, §6], [and] assessment of a civil penalty in accordance with the **Finance Code, §153.402, or issuance of a cease and desist order under the Finance Code, §153.407** [Act, §15].

(h) The commissioner may waive any requirement of this section upon a showing of good cause if the commissioner is of the opinion that:

(1) (No change.)

(2) the imposition of the requirement would cause an undue burden on the currency business and conformity with the requirement would not significantly advance the state's interests under the **Finance Code, Chapter 153** [Act].

(i) In lieu of compliance with this section, the commissioner may authorize a currency business to maintain [its] records **of currency transmission transactions** in accordance with 31 CFR, §103.33(f). Such authorization must be pursuant to the commissioner's written approval based on review of current audited financial statements of the currency business. To support authorization under this subsection, the audited financial statements must have been issued by a certified public accountant acceptable to the commissioner within the 18-month period prior to its submission to the department and must have an unqualified opinion. If at an examination or other review of the records of a currency business by the department a violation of 31 CFR, §103.33(f), or the **Finance Code, Chapter 153,** [Act] is cited, the authorization of the currency business pursuant to this subsection is subject to immediate revocation by order of the commissioner.

(j) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711178
Everette D. Jobe
General Counsel
State Finance Commission
Proposed date of adoption: October 24, 1997
For further information, please call: (512) 475-1300

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7 TAC §4.8

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the State Finance Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Finance Commission of Texas (the commission) proposes the repeal of §4.8, concerning custody of criminal history information.

The repeal is necessary because the source law was repealed in connection with its codification into the Penal Code by Acts 1993, 73rd Legislature, Chapter 790, and the requirement for rules was deleted in the process.

Everette D. Jobe, General Counsel, Texas Department of Banking, has determined that for the first five-year period the repeal as proposed will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Jobe also has determined that for each year of the first five-year period the repeal as proposed will be in effect, the public benefit anticipated as a result of the repeal will be the elimination of obsolete and potentially confusing regulations. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

Comments on the proposal may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

The repeal is proposed pursuant to rulemaking authority under the Finance Code, §153.002, which authorizes the commission to adopt rules necessary to implement the Finance Code, Chapter 153.

Finance Code, Chapter 153, and Government Code, §411.092, are affected by the proposed repeal.

§4.8. Custody of Criminal History Information.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711177
Everette D. Jobe
General Counsel
State Finance Commission
Proposed date of adoption: October 24, 1997
For further information, please call: (512) 475-1300

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Part II. Texas Department of Banking

Chapter 12. Loans and Investments

The Finance Commission of Texas (the commission) proposes amendments to §§12.2, 12.32, and 12.91, concerning loans and investments.

The proposed amendments will revise the manner in which statutory source law is cited to conform with the recent codification of the source law into the Finance Code, effective September 1, 1997. In the event of a simple citation change from source law to the Finance Code, the change is being made administratively, without the necessity of a proposed amendment and adoption. In the case of §§12.2, 12.32, and 12.91, substantial wording and organizational changes are required to change citations. No substantive changes will occur as a result of the amendments.

Proposed §12.32 must also be amended to delete references to repealed Texas Civil Statutes, Title 79, Subtitles 1-3. These statutes were either codified into the Finance Code by Act of May 24, 1997, House Bill 10, 75th Legislature, or repealed and replaced by Act of June 2, 1997, House Bill 1971, 75th Legislature. Because of the complexities created by the interaction of these two enactments, direct citation in §12.32 is deleted in favor of descriptive language.

Everette D. Jobe, General Counsel, Texas Department of Banking, has determined that for the first five-year period the sections as proposed will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Jobe also has determined that for each year of the first five-year period the sections as proposed will be in effect, the public benefit anticipated as a result of the amendments will be conformity of the section with underlying source law and con sequent reduction of potential public confusion. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted in writing to Everette D. Jobe, General Counsel, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294.

Subchapter A. Lending Limits

7 TAC §12.2

The amendment to §12.2 is proposed pursuant to the Finance Code, §31.003(a), which authorizes the commission to adopt rules "to accomplish the purposes of this subtitle and Chapters 11, 12, and 13, including rules necessary or reasonable to ... i mplement and clarify this subtitle and Chapters 11, 12, and 13 ...." Prior to September 1, 1997, identical rulemaking authority resides at Texas Civil Statutes, Article 342-1.012, the source law codified into Finance Code, §31.003.

As required by the Finance Code, §31.003(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

Finance Code, Chapter 34, Subchapter C, is affected by the proposed amendment.

§12.2. General Definitions.
Words and terms used in this subchapter that are defined in the **Finance Code, §31.002** [Act, §1.002], have the same meanings as defined in the **Finance Code** [Act]. The following words and terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

[Act-Texas Civil Statutes, Articles 342-1.001 et seq (the Texas Banking Act, §§1.001 et seq).]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711170
Everette D. Jobe
General Counsel
Texas Department of Banking
Proposed date of adoption: October 24, 1997
For further information, please call: (512) 475-1300

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Subchapter B. Loans

7 TAC §12.32

Amendments to §12.32 are proposed pursuant to the Finance Code, §31.003(a), which authorizes the commission to adopt rules "to accomplish the purposes of this subtitle and Chapters 11, 12, and 13, including rules necessary or reasonable to ... implement and clarify this subtitle and Chapters 11, 12, and 13 ...." Prior to September 1, 1997, identical rulemaking authority resides at Texas Civil Statutes, Article 342-1.012, the source law codified into Finance Code, §31.003.

As required by the Finance Code, §31.003(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

Finance Code, §34.203, is affected by the proposed amendment.

§12.32. Loan Fees and Charges.

(a) Applicability.

(1) **Finance Code, §34.203** [Texas Banking Act, §5.202], and this section apply to:

(A)-(B) (No change.)

(C) loans for personal, family, or household use that are repayable in a single installment [and subject to Texas Civil Statutes, Article 5069-1.01] (i.e., single pay consumer loans [other than loans under Texas Civil Statutes, Title 79, Subtitle Two, Chapter 3 (Articles 5069- 3.01 et seq)]).

(2) **Finance Code, §34.203** [Texas Banking Act, §5.202], and this section do not apply to a consumer loan payable in two or more installments [with a rate set under Texas Civil Statutes, Title 79, Subtitle Two, Chapters 2-8 (Articles 5069-2.01 through 5069-8.06), Subtitle Three, Chapter 15 (Articles 5069-15.01 through 5069-15.11), or Article 5069-1.04].

(b) (No change.)

(c) Calculation of reasonable fee.

(1)-(2) (No change.)

(3) Fees and expenses charged and collected in accordance with the **Finance Code, §34.203** [Act, §5.202], and in accordance with this section are not considered interest or compensation charged by the bank for the use, forbearance, or detention of money. However, fees and expenses which do not comply with these requirements may be characterized in litigation as interest.

(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711169
Everette D. Jobe
General Counsel
State Finance Commission
Proposed date of adoption: October 24, 1997
For further information, please call: (512) 475-1300

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Subchapter D. Other Real Estate Owned

7 TAC §12.91

Amendment to §12.91 is proposed pursuant to the Finance Code, §31.003(a), which authorizes the commission to adopt rules "to accomplish the purposes of this subtitle and Chapters 11, 12, and 13, including rules necessary or reasonable to ... implement and clarify this subtitle and Chapters 11, 12, and 13 ...." Prior to September 1, 1997, identical rulemaking authority resides at Texas Civil Statutes, Article 342-1.012, the source law codified into Finance Code, §31.003.

As required by the Finance Code, §31.003(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

Finance Code, §§34.001-34.003 and 34.204(a), is affected by the proposed amendment.

§12.91. Other Real Estate Owned.

(a) Definitions. Words and terms used in this subchapter that are defined in the **Finance Code, §31.002** [Act, §1.002], have the same meanings as defined in the **Finance Code** [Act]. The following words and terms when used in this subchapter shall have the following meanings unless the context clearly indicates the contrary.

(1) [Act-Texas Civil Statutes, Article 342-1.001 et seq (the Texas Banking Act, §1.001 et seq.]

[(2)] Appraisal–A written report by a state certified or licensed appraiser containing sufficient information to support the state bank's evaluation of OREO taking into consideration market value, analyzing appropriate deductions or discounts, and conforming to generally accepted appraisal standards unless principles of safe and sound banking require stricter standards.

(2) [(3)] Appraiser–A state certified or licensed staff appraiser or a state certified or licensed third party fee appraiser with relevant and competent experience and background as related to a particular appraisal assignment.

(3) [(4)] Bank facility–Real property, including improvements, owned or leased to the extent of the lease by a state bank if the real estate is held for the purposes set forth in the **Finance Code, §34.001** [Act, §5.001(a)(1)-(3)], and is not disqualified under the **Finance Code, §34.002(b)** [Act, §5.001(c)]. The term also includes capitalized leasehold improvements if held for the same purposes.

(4) [(5)] Coterminous sublease–A lease with the same duration as the remainder of the master lease.

(5) [(6)] Evaluation–A written report prepared by an evaluator describing the OREO and its condition, the source of information used in the analysis, the actual analysis and supporting information and the estimate of the OREO's market value, with any limiting conditions.

(6) [(7)] Evaluator–An individual who has related real estate training or experience and knowledge of the market relevant to the OREO but who has no direct or indirect interest in the OREO. An appraiser may be an evaluator.

(7) [(8)] Generally accepted appraisal standards–The Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board, Appraisal Foundation, Washington, D.C.

(8) [(9)] Market value–The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

(A)-(E) (No change.)

(9) [(10)] Non-coterminous sublease–A lease with a duration shorter than the remainder of the master lease.

(10) [(11)] Other Real Estate Owned (OREO)–Real estate, including improvements, mineral interests, surface, and subsurface rights, owned in whole or in part or leased by a state bank, no matter how acquired, which is not a bank facility as defined by paragraph **(3)** [(4)] of this subsection or leasehold property as permitted under the **Finance Code, §34.204(a)** [Act, §5.203(a)].

(11) [(12)] Staff appraiser–An appraiser on the staff of a state bank who has no direct or indirect interest in the OREO.

(12) [(13)] Third party fee appraiser–An appraiser who has an independent contractor relationship with a state bank and has no direct or indirect interest in the OREO.

(13) [(14)] Year–For the purposes of this section, a calendar year.

(b) Prohibition on real estate ownership. A state bank may not acquire or hold real estate except as specifically provided under the **Finance Code, §§34.001-34.003 and 34.204(a)** [Act, §§5.001, 5.002, and 5.203(a)], and this section.

(c)-(e) (No change.)

(f) Holding period.

(1) A state bank must dispose of OREO, except for real estate which became OREO pursuant to the **Finance Code, §34.002(b)** [Act, §5.001(c)], no later than five years after it was acquired or ceases to be used as a bank facility, unless an extension of time for disposing of the real estate is granted in writing by the banking commissioner pursuant to the **Finance Code, §34.003(d)** [Act, §5.002(d)]. A bank must dispose of real estate which becomes OREO pursuant to the **Finance Code, §34.002(b)** [Act, §5.001(c)], within two years of the date it ceases to be a bank facility, unless a delay in the improvement and occupation of the property is approved in writing by the banking commissioner pursuant to the **Finance Code , §34.002(b)** [Act, §5.001(c)].

(2)-(3) (No change.)

(g) (No change.)

(h) Disposition of OREO. A state bank may dispose of OREO by:

(1)-(3) (No change.)

(4) transferring the OREO for market value to an affiliate, subject to the **Finance Code, §33.109** [Act, §4.107], and applicable federal law, including 12 United States Code, §§371c, 371c-1, and 1828(j);

(5)-(6) (No change.)

(i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711168
Everette D. Jobe
General Counsel
Texas Department of Banking
Proposed date of adoption: October 24, 1997
For further information, please call: (512) 475-1300

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TITLE 16. ECONOMIC REGULATION

Part I. Railroad Commission of Texas

Chapter 3. Oil and Gas Division

Conservation Rules and Regulations

16 TAC §3.64

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Railroad Commission of Texas or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Railroad Commission of Texas proposes the repeal of §3.64, relating to out-of-state sale of gas produced from publicly owned and leased minerals. Although the Texas Administrative Code section number is 3.64, the rule is commonly known as "Statewide Rule 69."

The repeal is proposed to implement Senate Bill 1487 (S.B. 1487) enacted by the 75th legislature and effective September 1, 1997. S.B. 1487 repeals §§52.291 - 52.294 and 52.296 of the Texas Natural Resources Code. The repeal of these sections necessitates the repeal of Statewide Rule 69.

Larry Borella, assistant director, Office of General Counsel, Oil and Gas Section, has determined that for each of the first five years the proposed repeal is in effect there will be no fiscal implications for state or local government.

Mr. Borella also has determined that the public benefit anticipated as a result of the repeal will be the removal of a rule that is no longer valid. There is no anticipated additional economic cost to small businesses or to individuals as a result of the proposed repeal.

Comments on the proposal may be submitted to Larry Borella, Assistant Director, Oil and Gas Section, Office of General Counsel, Railroad Commission of Texas, P. O. Box 12967, Austin, Texas 78711-2967. Comments will be accepted for 30 days after publication in the *Texas Register*. For more information, contact Mr. Borella at (512) 463-6924.

The commission adopts the repeal pursuant to Texas Natural Resources Code, §§81.052, 85.042, 85.201, and 86.042, which authorizes the commission to prevent waste of oil and gas and to protect correlative rights.

Texas Natural Resources Code, §§52.291 - 52.294 and 52.296, are affected by the proposed repeal.

§3.64. Out-of-State Sale of Gas Produced from Publicly Owned and Leased Minerals.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711319
Marry Ross McDonald
Deputy General Counsel, Office of General Counsel
Railroad Commission of Texas

Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463-7008

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Part II. Public Utility Commission of Texas

Chapter 22. Practice and Procedure

The Public Utility Commission of Texas proposes to add two new subchapters to its procedural rules: Subchapter Q, Post-Interconnection Agreement Dispute Resolution (§§22.321-22.328), establishing procedures for resolution of disputes arising under or pertaining to interconnection agreements approved by the commission pursuant to its authority under the federal Telecommunications Act of 1996 (FTA96); and Subchapter R, Approval of Amendments to Existing Interconnection Agreements and Agreements Adopting Terms and Conditions Pursuant to FTA96 §252(i) (§§22.341-22.342), establishing procedures for approval of amendments to existing interconnection agreements and agreements adopting terms and conditions available under FTA96 §252(i). The commission is also proposing to amend Substantive Rule §23.97, relating to Interconnection, to provide a cross-reference to the new dispute resolution rules.

Further, the commission proposes certain modifications to existing Subchapter P, Dispute Resolution, to reflect current practice and to make minor changes. References to "secretary" are deleted, as that position no longer exists at the commission; the overall number of copies to be filed is changed from 18 to 13; and new provisions request filing a copy of interconnection agreements with requests for arbitration, filing a decision point list, and filing a joint application for approval of the interconnection agreement.

Proposed Subchapter Q provides four options when seeking resolution of disputes concerning the interpretation, implementation, or enforcement of interconnection agreements: informal settlement conference; formal dispute resolution hearing within 50 days; expedited hearing under certain conditions within 20 days; and interim ruling on request for relief pending resolution on the merits. With the exception of an informal settlement conference, the dispute resolution proceeding will be conducted by an arbitrator who will issue a written decision. That decision is reviewable only if one of the commissioners places the decision on the agenda for the next available open meeting. Proposed Subchapter R requires parties to file all amendments to interconnection agreements for commission review and approval. Unless good cause exists, such amendments will be administratively reviewed within 35 days of the filing of the amendment.

Mr. Steve Neinast, assistant director of the Office of Policy Development, has determined that for the first five-year period these sections are in effect there will be no fiscal implications for state or local government as a result of the enforcing or administering the sections.

Mr. Neinast also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the rules as proposed will be the availability of a forum for expeditious resolution of disputes resulting from interconnection agreements. Such resolutions will contribute to the implementation of interconnections among telecommunication carriers and consequent competition in the telecommunication market.

There is no anticipated economic cost to persons who are required to comply with the sections as proposed. For each year of the first five years the sections are in effect, there will be no effect on small businesses as a result of enforcing the proposed sections.

Mr. Neinast has further determined that for the first five years the proposed sections are in effect there will be no impact on the opportunities for employment in the geographic areas of Texas affected by implementing the requirements of the rules.

Comments on the proposed rule (13 copies) may be submitted to the Filing Clerk, Public Utility Commission, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, on or before September 15, 1997. Reply comments may be submitted on or before September 22, 1997. All comments should refer to Project Number 17329.

Subchapter P. Dispute Resolution

16 TAC §§22.303, 22.305, 22.308, 22.309

The amendments are proposed under the Public Utility Regulatory Act of 1995 as amended (PURA95), Texas Revised Civil Statutes Annotated, Article 1146c-0, §1.101 (Vernon 1997), which provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure and FTA96, which authorizes the commission to engage in negotiation, arbitration, approval, and enforcement of agreements for interconnection, services, or network elements.

Cross-reference to statutes: Public Utility Regulatory Act of 1995 as amended (PURA95), Texas Revised Civil Statutes Annotated, Article 1146c-0, §1.101 (Vernon 1997).

§22.303. Mediation.

Any party negotiating a request for interconnection, services or network elements under FTA96 §251 may request, in writing, that the commission assist the parties by mediating any differences that have arisen in the negotiations. Six copies of the request shall be filed with the commission filing clerk and a copy shall be served on each of the other parties involved in the negotiations. The request shall identify the parties involved in the negotiations, the potential issues for which mediation may be needed and, if possible, an estimate of the time period during which mediation will be pursued. The **commission** [secretary] shall notify the parties of the commission employee who is assigned to serve as a mediator. The commission employee assigned to serve as a mediator may not participate in arbitration or review and approval proceedings initiated under this subchapter involving the parties to the mediation. The mediator will work with the parties to establish an appropriate schedule and procedure for mediating any disputes. The mediator's role is limited to assisting the parties in attempting to reach an agreed resolution of the issues.

§22.305. Compulsory Arbitration.

(a) Request for Arbitration. Any party to negotiations concerning a request for interconnection, services or network elements pursuant to §251 of the FTA96 may request arbitration by the commission by filing with the commission's filing clerk **13** [18] copies of

a request for arbitration. The request must be received by the commission during the period from the 135th to the 160th day (inclusive) after the date the LEC received the request for negotiation from the other negotiating party. The request for arbitration shall include:

(1) - (3) (No change.)

(4) a list of the issues that have been resolved by the parties and how such resolution complies with the requirements of the FTA96; [and]

(5) if the request concerns a request for interconnection under §23.97 of this title (relating to Interconnection), the material required by §23.97(g) of this title**;**[.] **and**

(6) the most current version of the interconnection agreement being negotiated by the parties, if any, containing both the agreed language and the disputed language of both parties.

(b) Response. Any non-petitioning party to the negotiation may respond to the request for arbitration by filing **13** [18] copies of the response with the commission's filing clerk and serving a copy on each party to the negotiation. The response must be filed within 25 days after the commission received the request for arbitration. The response shall indicate any disagreement with the matters contained in the request for arbitration and may provide such additional information as the party wishes to present.

(c) Selection of Arbitrator. Upon receipt of a complete request for arbitration, [the secretary shall select] an arbitrator **shall be selected** to act for the commission, unless two or more of the Commissioners choose to hear the arbitration en banc. The [secretary shall notify the] parties **shall be notified** of the commission-designated arbitrator, or of the Commissioners' decision to act as arbitrator themselves. The arbitrator may be advised on legal and technical issues by members of the commission staff designated by the arbitrator. The commission staff members selected to advise the arbitrator shall be identified to the parties.

(d) - (m) (No change.)

(n) Decision Point List (DPL). At the arbitrator's request, the parties shall develop a DPL before the start of the hearing that includes the specific issues to be decided in the compulsory arbitration, the parties' position on each issue and reference to the parties' testimony relevant to that issue. The DPL may be amended before the close of the arbitration hearing, provided that the opposing party has a reasonable opportunity to present evidence on any issue to be added to the DPL.

(o) [(n)] Cross-examination. Each witness presenting written direct testimony shall be available for cross-examination by the other parties to the arbitration. The arbitrator shall judge the credibility of each witness and the weight to be given his or her testimony based upon his or her response to cross- examination. If the arbitrator determines that a witness' responses are evasive or non-responsive to the questions asked, the arbitrator may disregard the witness' testimony on the basis of a lack of credibility.

(p) [(o)] Clarifying Questions. The arbitrator or a staff member identified as an advisor to the arbitrator may ask clarifying questions at any point during the proceeding and may direct a party or a witness to provide additional information as needed to fully develop the record of the proceeding. If a party fails to present information requested by the arbitrator, the arbitrator shall render a decision on the basis of the best information available from whatever source derived.

(q) [(p)] Briefs. The arbitrator may require the parties to submit post- hearing briefs or written summaries of their positions. The arbitrator shall determine the filing deadline and any limitations on the length of such submissions.

(r) [(q)] Time for Decision. The arbitrator shall endeavor to issue a final decision on the arbitration within 30 days after the conclusion of the hearing. The arbitrator shall issue a final decision not later than nine months after the date the LEC received the request for negotiation under the FTA96.

(s) [(r)] Decision. The final decision and report of the arbitrator shall be based upon the record of the arbitration hearing. The arbitrator may agree with the positions of one or more of the parties on any or all issues or may offer an independent resolution of the issues. The final decision and report of the arbitrator shall include:

(1) a ruling on each of the issues presented for arbitration by the parties;

(2) a statement of any conditions imposed on the parties to the agreement in order to comply with the provisions of FTA96 §252(c);

(3) a statement of how the final decision meets the requirements of FTA96 §251, including any regulations adopted by the FCC pursuant to §251;

(4) the rates for interconnection, services, and/or network elements established according to FTA96 §252(d);

(5) a schedule for implementation of the terms and conditions by the parties to the agreement; and

(6) a narrative report explaining the arbitrator's rationale for each of the rulings included in the final decision, unless the arbitration is conducted by two or more of the commissioners acting as the arbitrator.

(t) [(s)] Distribution. The final decision and report of the arbitrator shall be filed with the commission as a public record and shall be mailed by first class mail to all parties of record in the arbitration.

§22.308. Approval of Negotiated Agreements.

(a) Application. Any agreement adopted by negotiation shall be submitted to the commission for review and approval and may be submitted by any of the parties to the agreement. The parties requesting approval shall submit an application for approval of the agreement by filing **13** [18] copies of the application with the commission's filing clerk and serving a copy on each of the parties to the agreement. Any agreement submitted to the commission for approval is a public record and no portion of the agreement may be treated as confidential information under §22.306 of this title (relating to Confidential Information). An application for approval of a negotiated agreement shall include:

(1) - (3) (No change.)

(b) Notice. The presiding officer may require the parties to the agreement to provide reasonable notice of the filing of the agreement. The presiding officer may require publication of the notice in addition to direct notice to affected persons. The presiding officer shall determine the appropriate scope and wording of the notice to be provided. In addition to any notice ordered by the presiding officer, the **commission** [secretary] shall cause to be published notice of the filing of the agreement in the *Texas Register*.

(c) (No change.)

(d) Comments. An interested person or the general counsel may file comments on the negotiated agreement by filing **13** [18] copies of the comments with the commission's filing clerk and serving a copy of the comments on each party to the agreement. As a part of the comments, a person may include a request for a public hearing on the agreement. The comments shall include the following information:

(1) - (3) (No change.)

(e) - (h) (No change.)

§22.309. Approval of Arbitrated Agreements.

(a) Application. Any agreement resulting from arbitration shall be submitted to the commission for review and approval in accordance with the requirements and schedule established in the arbitrator's final decision and report. Following the conclusion of an arbitration proceeding under §22.305 of this title (relating to Compulsory Arbitration), **the parties** [a party] shall **jointly file** [submit] an application for approval of the agreement by filing **13** [18] copies of the application with the commission's filing clerk [and serving a copy of the application on each of the parties to the agreement]. Any agreement submitted to the commission for approval is a public record and no portion of the agreement may be treated as confidential information under §22.306 of this title (relating to Confidential Information). The application for approval of an arbitrated agreement shall include:

(1) - (3) (No change.)

(b) Notice. The presiding officer may require the parties to the agreement to provide reasonable notice of the filing of the agreement. The presiding officer may require publication of the notice in addition to direct notice to affected persons. The presiding officer shall determine the appropriate scope and wording of the notice to be provided. In addition to any notice ordered by the presiding officer, the **commission** [secretary] shall cause to be published notice of the filing of the agreement in the *Texas Register*.

(c) (No change.)

(d) Comments. An interested person and the general counsel may file written comments concerning the agreement by filing **13** [18] copies of the comments with the commission's filing clerk and serving a copy of the comments on each of the parties to the agreement. Such comments shall be limited to whether the agreement meets the requirements of the FTA96 and relevant portions of state law. If such comments request rejection or modification of the agreement, the interested person must provide the following information:

(1) - (3) (No change.)

(e) - (g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711238
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 6, 1997

For further information, please call: (512) 936–7308

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Subchapter Q. Post-Interconnection Agreement Dispute Resolution

16 TAC §§22.321 – 22.328

The new sections are proposed under the Public Utility Regulatory Act of 1995 as amended (PURA95), Texas Revised Civil Statutes Annotated, Article 1146c-0, §1.101 (Vernon 1997), which provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure and FTA96, which authorizes the commission to engage in negotiation, arbitration, approval, and enforcement of agreements for interconnection, services, or network elements.

§22.321. Purpose.

This subchapter establishes procedures for commission resolution of disputed issues arising under or pertaining to interconnection agreements approved by the commission pursuant to its authority under the federal Telecommunications Act of 1996 (FTA96). The disputed issues may include, but are not limited to, matters not explicitly addressed in the interconnection agreement. The dispute resolution procedures are intended to resolve disputes concerning:

(1) proper interpretation of terms and conditions in the interconnection agreements;

(2) implementation of activities explicitly provided for, or implicitly contemplated in, the interconnection agreements; and

(3) enforcement of terms and conditions in such interconnection agreements.

§22.322. Definitions.

In addition to the terms defined in Subchapter P, §22.302 of this title (relating to Definitions), the following words and terms when used in this subchapter shall have the following meaning, unless the context clearly indicates otherwise.

Arbitrator - The commission, any commissioner, or any commission employee selected by the commission to serve as the presiding officer in a dispute resolution hearing. The provisions of Subchapter P, §22.307 of this title (relating to Subsequent Proceedings) shall not apply to this subchapter to the extent that the provisions of §22.307 would preclude participation of a commission staff employee who participated in the dispute resolution proceeding subject to subchapter P from participating in the dispute resolution proceeding subject to this subchapter.

Dispute resolution proceeding - A proceeding conducted by an arbitrator or commission employee in accordance with this subchapter. A dispute resolution proceeding is not a contested case subject to the Administrative Procedure Act, Texas Government Code, §§2001.001, *et. seq.* A dispute resolution proceeding may include formal or informal hearings.

Informal settlement conference- One or more optional, informal meetings between commission staff (an arbitrator or other commission employee) and parties to an interconnection agreement. The purpose of the informal settlement conference is to provide a forum in which disputes may be resolved outside of a more formal hearing procedure.

§22.323. Filing of Agreement.

To the extent that the arbitrator concludes that the dispute resolution requires amending the interconnection agreement, such amended agreement shall be submitted to the commission for review and approval in accordance with Subchapter P, §22.309 of this title (relating to Approval of Arbitrated Agreements).

§22.324. Confidential Information.

If a party believes that any material it files or must produce in the dispute resolution proceeding contains confidential information, the procedures identified in Subchapter P, §22.306 of this title (relating to Confidential Information) shall apply.

§22.325. Informal Settlement Conference.

(a) Filing a request. Either party to an interconnection agreement may request an informal settlement conference by filing 13 copies of a written request with the commission and, on the same day, delivering a copy of the request either by hand delivery or by facsimile to the other party (respondent) to the interconnection agreement from which the dispute arises. The written request should include:

(1) The name, address, telephone number and facsimile number of each party to the interconnection agreement and the requesting party's designated representative;

(2) A description of the parties' efforts to resolve their differences by negotiation;

(3) A list of the discrete issues in dispute, with a cross-reference to the area or areas of the agreement applicable or pertaining to the issues in dispute; and

(4) The requesting party's proposed solution to the dispute.

(b) The settlement conference. The commission staff conducting the informal settlement conference shall notify the parties of the time, date, and location of the settlement conference, which shall be held no later than 10 business days from the date the request was filed. The commission staff may require the respondent to file a response to the request. The parties should provide the appropriate personnel with authority to discuss and to resolve the disputes at the settlement conference.

(c) Conduct. The settlement conference shall be conducted as informal meetings and will not be transcribed. Only parties to the interconnection agreement may participate as parties to the settlement conference.

(d) Results of settlement conference. The settlement conference may result in an agreement on the resolution of the dispute described in the request. If an agreement is reached, the agreement will be binding on the parties. In the event that the parties do not reach an agreement as a result of the settlement conference, either party may utilize other procedures for dispute resolution provided in this subchapter.

§22.326. Formal Dispute Resolution Proceeding.

(a) Initiation of formal proceeding. A formal proceeding for dispute resolution under this subchapter will commence when a party (complainant) files a complaint with the commission and, on the same day, delivers a copy of the complaint either by hand delivery or by facsimile to the other party (respondent) to the interconnection agreement from which the dispute arises.

(1) The complaint shall include:

(A) the name, address, telephone number and facsimile number of each party to the interconnection agreement and the complainant's designated representative;

(B) a description of the parties' efforts to resolve their differences by negotiation;

(C) a detailed list of the discrete issues in dispute, with a cross- reference to the area or areas of the agreement applicable or pertaining to the issues in dispute;

(D) an identification of pertinent background facts and relevant law or rules applicable to each disputed issue; and

(E) the complainant's proposed solution to the dispute.

(2) To the extent applicable, the complainant may also include in the complaint a request for an expedited ruling under §22.327 of this title (relating to Request for Expedited Ruling) or an interim ruling under §22.328 of this title (relating to Request for Interim Ruling Pending Dispute Resolution).

(b) Response to the complaint. Unless §22.327 or §22.328 of this title apply, the respondent shall file a response to the complaint within 10 business days after the filing of the complaint. On the response filing date, the respondent shall serve a copy of the response on the complainant. The response shall specifically affirm or deny each allegation in the complaint. The response shall include the respondent's position on each issue in dispute, a cross-reference to the area or areas of the contract applicable or pertaining to the issue in dispute, and the respondent's proposed solution on each issue in dispute. In addition, the response also shall:

(1) stipulate to any undisputed facts; and

(2) identify relevant law or rules applicable to each disputed issue.

(c) Reply to response to complaint. Unless §22.327 or §22.328 of this title apply, the complainant may file a reply within five business days after the filing of the response to the complaint and serve a copy on respondent on the same day. The reply shall be limited solely to new issues raised in the response to the complaint.

(d) Provisions incorporated from Subchapter P, §22.305 of this title (relating to Compulsory Arbitration). Except as specified otherwise in this subchapter, the following provisions of Subchapter P, §22.305 are incorporated by reference into this subchapter: §22.305(c), (d), (f), (h), (i), (j), (l), (o), (p), and (q).

(e) Number of copies to be filed. Unless otherwise ordered by the arbitrator, parties shall file 13 copies of pleadings subject to this subchapter.

(f) Participation. Only parties to the interconnection agreement may participate as parties in the dispute resolution proceeding subject to this subchapter.

(g) Notice and hearing. Unless §22.327 or §22.328 apply, the arbitrator shall make arrangements for the hearing to address the complaint, which shall commence no later than 50 days after filing of the complaint. The arbitrator shall notify the parties, not less than 15 days before the hearing, of the date, time, and location of the hearing. The hearing shall be transcribed by a court reporter designated by the arbitrator.

(h) Authority of arbitrator. The arbitrator has broad discretion in conducting the dispute resolution proceeding and has the authority given to a presiding officer pursuant to Subchapter K §22.202 of this title (relating to Presiding Officer). The arbitrator shall also have the authority to award remedies or relief deemed necessary by the arbitrator to resolve a dispute subject to the procedures established in this subchapter. The authority to award remedies or relief includes, but is not limited to, the award of prejudgment interest, specific performance of any obligation created in or found by the arbitrator to be intended under the interconnection agreement subject to the dispute, issuance of an injunction, or imposition of sanctions for abuse or frustration of the dispute resolution process subject to this subchapter and Subchapter P, except that the arbitrator does not have authority to award punitive or consequential damages.

(i) Discovery. Parties may obtain discovery by submitting requests for information (RFIs), which include requests for inspection and production of documents, requests for admissions, and depositions by oral examination, as provided by Subchapter H, §22.141(b) of this title (relating to Discovery Methods), and as allowed within the discretion of the arbitrator.

(j) Prefiled evidence/witness list. The arbitrator shall require the parties to file a direct case and a joint decision point list (DPL) on or before the commencement of the hearing. The prepared direct case shall include all of the party's direct evidence, including written direct testimony of all of its witnesses and all exhibits that the party intends to offer. The DPL shall identify all issues to be addressed, the witnesses who will be addressing each issue, and a short synopsis of each witness's position on each issue. Except as provided in §22.324 of this title (relating to Confidential Information), all materials filed with the commission or provided to the arbitrator shall be considered public information under the Open Records Act, Texas Government Code, §§552.001, et seq.

(k) Decision.

(1) The written decision of the arbitrator shall be filed with the commission within 15 days after the close of the hearing and shall be mailed by first- class mail to all parties of record in the dispute resolution proceeding. The decision of the arbitrator shall be based upon the record of the dispute resolution hearing, and shall include a specific ruling on each of the disputed issues presented for resolution by the parties. The decision may also contain the items addressed in Subchapter P, §22.305(r)(4)-(6) to the extent deemed necessary by the arbitrator to explain or support the decision. On the same day that the decision is issued, the arbitrator shall notify the parties by facsimile that the decision has been issued.

(2) Within three business days from the date the arbitrator's decision is issued, any commissioner may place the arbitrator's decision on the agenda for the next available open meeting. If no commissioner places the arbitrator's decision on the open meeting agenda within three business days, the arbitrator's decision is final and effective on the expiration of that third business day. The arbitrator may provide for later implementation of specific provisions as addressed in the arbitrator's decision. Should the decision be scheduled for open meeting, then the decision shall be stayed until the commission affirms or modifies the decision.

§22.327. Request for Expedited Ruling.

(a) Purpose. This section establishes procedures pursuant to which a party who files a complaint to initiate a dispute resolution under this subchapter may request an expedited ruling when the dispute directly affects the ability of a party to provide uninterrupted service to its customers or precludes the provisioning of any service, functionality, or network element. The arbitrator has the discretion to determine whether the resolution of the complaint may be expedited based on the complexity of the issues or other factors deemed relevant. Except as specifically provided in this section, the provisions and procedures of §22.326 of this title (relating to Formal Dispute Resolution Proceeding) apply.

(b) Filing a request. Any request for expedited ruling shall be filed at the same time and in the same document as the complaint filed pursuant to §22.326. The complaint shall be entitled "Complaint and Request for Expedited Ruling." In addition to the requirements listed in §22.326(a), the complaint shall also state the specific circumstances that make the dispute eligible for an expedited ruling.

(c) Response to complaint. The respondent shall file a response to the complaint within five business days after the filing of the complaint. In addition to the requirements listed in §22.326(b), the respondent shall state its position on the request for an expedited ruling. The respondent shall serve a copy of the response on the complainant by hand-delivery or facsimile on the same day as it is filed with the commission.

(d) Hearing. After reviewing the complaint and the response, the arbitrator will determine whether the complaint warrants an expedited ruling. If so, the arbitrator shall make arrangements for the hearing, which shall commence no later than 20 days after the filing of the complaint. The arbitrator shall notify the parties, not less than three business days before the hearing of the date, time, and location of the hearing. If the arbitrator determines that the complaint is not eligible for an expedited ruling, the arbitrator shall so notify the parties within five days of the filing of the response.

(e) Decision point list (DPL) and witness list. The arbitrator may require the parties to file a DPL on or before the commencement of the hearing. The DPL shall identify all issues to be addressed, the witness, if any, who will be addressing each issue, and a short synopsis of each witness's position on each issue. Except as provided in §22.324 of this title (relating to Confidential Information), all materials filed with the commission or provided to the arbitrator shall be considered public information under the Open Records Act, Texas Government Code, §§552.001, et seq.

(f) Decision. The arbitrator shall issue a written decision on the complaint within 10 days after the close of the hearing. On the day of the issuance, the arbitrator shall notify the parties by facsimile that the decision has been issued. A decision issued pursuant to this section is subject to the commission review provisions under §22.326(k) and will become final under the terms therein.

§22.328. Request for Interim Ruling Pending Dispute Resolution.

(a) Purpose. This section establishes procedures pursuant to which a party who files a complaint to initiate a dispute resolution under either §22.326 of this title (relating to Formal Dispute Resolution Proceeding) or §22.327 of this title (relating to Request for Expedited Ruling) may also request an interim ruling on whether the party is entitled to relief pending the resolution of the merits of the dispute. This section is intended to provide an interim remedy when the dispute compromises the ability of a party to provide uninterrupted service or precludes the provisioning of scheduled service.

(b) Filing a request. Any request for an interim ruling shall be filed at the same time and in the same document as the complaint

filed pursuant to §22.326 or §22.327 of this title. The heading of the complaint shall include the phrase "Request for Interim Ruling." The complaint shall set forth the specific grounds supporting the request for interim relief pending the resolution of the dispute, as well as a statement of the potential harm that may result if interim relief is not provided. A complaint that includes a request for interim ruling shall be verified by affidavit. Such complaint must list the contact person, address, telephone number, and facsimile number for both the complainant and respondent.

(c) Service. The complainant shall serve a copy of the complaint and request for an interim ruling on the respondent by hand-delivery or facsimile on the same day as the pleading is filed with the commission. The complainant shall certify on the pleading filed with the commission that service has been accomplished in compliance with this rule.

(d) Hearing. Within three business days of the filing of a complaint and request for interim ruling, the arbitrator selected under this subchapter shall conduct a hearing to determine whether interim relief should be granted during the pendency of the dispute resolution process. The arbitrator will notify the parties of the date and time of the hearing by facsimile within 24 hours of the filing of a complaint and request for interim ruling. The parties should be prepared to present their positions and evidence on factors including but not limited to: the type of service requested; the economic and technical feasibilities of providing that service; and the potential harm in providing the service. The arbitrator will issue an interim ruling on the request based on the evidence provided at the hearing.

(e) Ruling. The arbitrator shall issue a written ruling on the request within 24 hours of the close of the hearing and will notify the parties by facsimile of the ruling. The interim ruling will be effective throughout the dispute resolution proceeding until a final decision is issued pursuant to this subchapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711239
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 936–7308

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Subchapter R. Approval of Amendments to Existing Interconnection Agreements and Agreements Adopting Terms and Conditions Pursuant to FTA96 §252(i)

16 TAC §22.341, §22.342

The new sections are proposed under the Public Utility Regulatory Act of 1995 as amended (PURA95), Texas Revised Civil Statutes Annotated, Article 1146c-0, §1.101 (Vernon 1997), which provides the Public Utility Commission of Texas with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure and FTA96, which authorizes the commission to engage in negotiation, arbitration, approval, and enforcement of agreements for interconnection, services, or network elements.

§22.341. Approval of Amendments to Existing Interconnection Agreements.

(a) Application. Any amendments, including modifications, to a previously approved interconnection agreement shall be submitted to the commission for review and approval. Any or all parties to the agreement may file the application for approval of the amendments. The parties requesting approval shall file 13 copies of the application with the commission's filing clerk and, when applicable, serve a copy on each of the other parties to the agreement. An application for approval of an amended agreement shall include:

(1) a complete and unredacted copy of the amended portions of the interconnection agreement, along with any other relevant portions to place the amendments in context;

(2) the name, address, and telephone number of each of the parties to the agreement; and

(3) an affidavit by the signatory parties explaining how the agreement is consistent with the public interest, convenience, and necessity, including all relevant requirements of state law.

(b) Notice. The commission may require the parties to the agreement to provide reasonable notice of the filing of the agreement. The commission shall determine the appropriate scope and wording of the notice to be provided. In addition to any notice ordered by the commission, the commission shall cause to be published notice of the filing of the agreement and request for comments in the *Texas Register*.

(c) Proceeding. An application considered under this section shall be reviewed by commission staff unless the commission, for good cause, determines at any point during the review that a formal review process pursuant to Subchapter P, §22.308 of this title (relating to Approval of Negotiated Agreements) or §22.309 of this title (relating to Approval of Arbitrated Agreements) is necessary. The commission staff may issue a procedural order establishing additional procedural requirements.

(d) Interim approval. Interim approval of the application may be granted based on the agreement of all parties to the interconnection agreement.

(e) Comments. An interested person or the general counsel may file comments on the amended agreement by filing 13 copies of the comments with the commission's filing clerk and serving a copy of the comments on each party to the agreement within 20 days of the filing of the application. The comments shall include the following information:

(1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

(2) specific allegations that the agreement, or some portion thereof:

(A) discriminates against a telecommunications carrier that is not a party to the agreement; or

(B) is not consistent with the public interest, convenience, and necessity; or

(C) is not consistent with other requirements of state law; and

(3) the specific facts upon which the allegations are based.

(f) Approval or denial of application.

(1) In reviewing applications under this section, the commission shall consider evidence and argument concerning whether the amended portions of the agreement:

(A) discriminate against a telecommunications carrier that is not a party to the agreement; or

(B) are not consistent with the public interest, convenience, and necessity; or

(C) are not consistent with the other requirements of state law.

(2) The application shall be approved if, based on the staff's review, the commission determines that all requirements have been met. If the commission determines that not all requirements have been met, the application shall either be denied or scheduled for further review pursuant to §22.308 or §22.309 of this title. The commission shall issue notice of approval, denial, or further review within 35 days of the filing of the application.

(g) Filing of agreement. If the commission approves the amendments to the agreement, the parties to the agreement shall file a complete amended interconnection agreement with the commission's filing clerk, if one has not already been filed, within 10 days of the commission's decision.

§22.342. Approval of Agreements Adopting Terms and Conditions Pursuant to Federal Telecommunications Act of 1996 (FTA96) §252(i).

(a) Application. Under FTA96 §252(i), a local exchange carrier shall make available any interconnection, service, or network element provided under a previously approved interconnection agreement to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. Any agreement adopting terms and conditions of a previously approved interconnection agreement pursuant to FTA96 §252(i) shall be submitted to the commission for review and approval. Any or all of the parties to the agreement may file the application for approval. The parties requesting approval shall file 13 copies of the application with the commission's filing clerk and, when applicable, serve a copy on each of the other parties to the agreement. An application for approval of an agreement adopting terms and conditions pursuant to §252(i) shall include:

(1) a complete and unredacted copy of the agreement;

(2) the name, address, and telephone number of each of the parties to the agreement;

(3) the identity of the previously approved interconnection agreement from which the agreement is taken; and

(4) an affidavit by the signatory parties explaining how the agreement is consistent with the public interest, convenience, and necessity, including all relevant requirements of state law.

(b) Provisions incorporated from §22.341 of this title (relating to the Approval of Amendments to Existing Interconnection Agreements). Applications for approval filed under this section shall be processed according to the following provisions of §22.341 of this title, which are incorporated by reference into this section: §22.341(b), (c), (d), (e), (f), and (g).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711240
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 936–7308

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Chapter 23. Substantive Rules

Telephone

16 TAC §23.97

The Public Utility Commission of Texas proposes an amendment to §23.97, relating to Interconnection, to provide a cross-reference to the commission's new procedural rules relating to Post-Interconnection Agreement Dispute Resolution. The amended rule will make clear that those entering into interconnection agreements have access to the commission to settle disputes that may arise pursuant to those agreements.

Mr. Steve Neinast, assistant director of the Office of Policy Development, has determined that for the first five-year period these amendments are in effect there will be no fiscal implications for state or local government as a result of the enforcing or administering the amendments.

Mr. Neinast also has determined that for each year of the first five years the amendments are in effect the public benefit anticipated as a result of enforcing the rule as proposed will be to inform parties to interconnection agreements that the commission is available as a forum for expeditious resolution of disputes resulting from such agreements.

There is no anticipated economic cost to persons who are required to comply with the amendments as proposed. For each year of the first five years the amendments are in effect, there will be no effect on small businesses as a result of enforcing the proposed amendments.

Mr. Neinast has further determined that for the first five years the proposed amendments are in effect there will be no impact on the opportunities for employment in the geographic areas of Texas affected by implementing the requirements of the rule.

Comments on the proposed rule (13 copies) may be submitted to the Filing Clerk, Public Utility Commission, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, on or before September 15, 1997. Reply comments may be submitted on or before September 22, 1997. All comments should refer to Project Number 17329.

The amendment is proposed under the Public Utility Regulatory Act of 1995 as amended (PURA95), Texas Revised Civil Statutes Annotated, Article 1146c-0, §1.101 (Vernon 1997), which provides the Public Utility Commission of Texas with the

authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure and the federal Telecommunications Act of 1996, which authorizes the commission to engage in negotiation, arbitration, approval, and enforcement of agreements for interconnection, services, or network elements.

Cross-reference to statutes: Public Utility Regulatory Act of 1995 as amended (PURA95), Texas Revised Civil Statutes Annotated, Article 1146c-0, §1.101 (Vernon 1997).

§23.97. Interconnection.

(a) - (e) (No change).

(f) Negotiations.

(1) - (9) (No change.)

(10) Any disputes arising under or pertaining to negotiated interconnection agreements may be resolved pursuant to Chapter 22, Subchapter Q, of this title (relating to Post-Interconnection Agreement Dispute Resolution).

(g) Compulsory arbitration process.

(1) - (4) (No change.)

(5) Any disputes arising under or pertaining to arbitrated interconnection agreements may be resolved pursuant to Chapter 22, Subchapter Q, of this title (relating to Post-Interconnection Agreement Dispute Resolution).

(h) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711241
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 936–7308

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Part VI. Texas Motor Vehicle Commission

Chapter 101. Practice and Procedure

General Rules

16 TAC §101.6, §101.16

The Texas Motor Vehicle Board proposes an amendment to §101.6, concerning Appearances, and new §101.16, concerning Expenses of Witness or Deponent.

The proposed amendments to §101.6 add language allowing the Board to require agreements between a party in interest and an attorney or other authorized representative concerning any pending proceeding to be in writing, signed by the party in interest, and filed as a part of the record of the proceeding. The rule currently provides that no agreement will be recognized by the Board unless it is in writing, signed by the party in interest, and filed as a part of the record of the proceeding. By amending this provision, the Board will have the option of requiring this documentation.

Proposed new §101.16 allows mileage reimbursement for non-party witnesses and deponents equivalent to the current state employee rate for going to and returning from the place of the hearing or deposition, if the place is more than 25 miles from the person's place of residence and the person uses a personally owned or leased motor vehicle for the travel.

Brett Bray, Director, Motor Vehicle Division, has determined that for the first five-year period the sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Bray also has determined that for each year of the first five years the sections are in effect, the anticipated public benefit of §101.6 will be to conserve the time and resources of the agency and entities appearing before it. The public benefit of new §101.16 will entitle non-party witnesses and deponents to the same rate of reimbursement as state employees rather than limiting them to ten cents a mile, as provided in §2001.103 of the Texas Government Code, which allows reimbursement at ten cents per mile or a greater amount prescribed by agency rule. There will be no effect on small businesses and no anticipated economic cost to persons who are required to comply with this section as proposed. Mr. Bray has also certified that there will be no impact on local economies or overall employment as a result of enforcing or administering the section.

Comments on the proposals may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas 78768, 512/416-4800. The Motor Vehicle Board will consider adoption of the proposals at its meeting on October 9, 1997. The deadline for receipt of comments on the proposed amendments is 5:00 p.m. on September 23, 1997.

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules as necessary and convenient to effectuate the provisions of the Act and to govern practice and procedure before the agency and the Texas Government Code, §2001.103, which allows agencies to prescribe mileage reimbursement rates by rule.

Motor Vehicle Commission Code, §3.08 and Texas Government Code, §2001.103 are affected by the proposed amendment and new rule.

§101.6. Appearances.

(a) (No change.)

(b) Agreements of representation. **The Board may require** agreements [No agreement] between a party in interest and an attorney or other authorized representative concerning any pending proceeding **to be** [will be recognized by the commission unless it is] in writing, signed by the party in interest, and filed as a part of the record of the proceeding.

(c)-(e) (No change.)

§101.16. Expenses of Witness or Deponent.

A witness or deponent in a contested case who is not a party and who is subpoenaed or otherwise compelled to attend a hearing or proceeding to give testimony or a deposition or to produce books, records, papers, or other objects that may be necessary and proper for the purposes of a proceeding under the code is entitled to receive expenses pursuant to provisions of the Texas Government Code §2001. Such witness or deponent is entitled to receive reimbursement for mileage at the current state employee rate for each mile, for going to and returning from the place of the hearing or deposition, if the place is more than 25 miles from the person's place of residence and the person uses a personally owned or leased motor vehicle for the travel.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711248
Brett Bray
Director
Texas Motor Vehicle Commission
Proposed date of adoption: October 9, 1997
For further information, please call: (512) 463–8630

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Adjudicative Proceedings and Hearings

16 TAC §101.52

The Texas Motor Vehicle Board proposes to amend §101.52(e) concerning Evidence. Currently, any information held in the files of the Board may be admitted and considered in evidence only if proven into the official record.

The proposed amendment to §101.52 will allow an Administrative Law Judge, under appropriate circumstances as defined under the Texas Government Code, Chapter 2001, to take official notice of information listed in Motor Vehicle Division licensing files as necessary to improve the efficiency and effectiveness of the administrative process. Official notice is a method defined in the Texas Government Code and used in administrative hearings to allow certain facts into the official record as true, without evidence, where the existence of that fact is considered to be common knowledge and uncontroverted.

Brett Bray, Director, Motor Vehicle Division, has determined that for the first five-year period the sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Allowing Administrative Law Judges holding hearings under the Texas Motor Vehicle Commission Code to use official notice as a tool in the hearing process will benefit the public by conserving the time and resources of the agency, as well as those who practice before it. There will be no effect on small businesses and no anticipated economic cost to persons who are required to comply with this section as proposed.

Comments on the proposal may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas 78768, 512/416-4800. The Motor Vehicle Board will consider adoption of the proposal at its meeting on October 9, 1997. The deadline for receipt of comments on the proposed amendments is 5:00 p.m. on September 23, 1997.

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules as necessary and convenient to effectuate the provisions of the Act and to govern practice and procedure before the agency.

Motor Vehicle Commission Code, §3.08 and Texas Government Code, §2001 are affected by the proposed amendment.

§101.52. Evidence.

(a)-(d) (No change.)

(e) Documents in **board's** [commission's] files. Documents or information in the **licensing** files of the **board** [commission] may [not] be officially noticed and may be admitted and considered **by the Administrative Law Judge, as described in Chapter 2001 of the Texas Government Code** [only if proven and incorporated into the record].

(f)-(g) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711249
Brett Bray
Director
Texas Motor Vehicle Commission
Proposed date of adoption: October 9, 1997
For further information, please call: (512) 463–8630

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Chapter 103. General Rules

The Texas Motor Vehicle Board proposes to amend §103.1, concerning Representative Defined, and §103.4, concerning Notification of License Application; Protest Requirements. The Board also proposes to repeal §103.2, concerning Records.

Section 103.1 is amended to reflect recent legislative changes to the Texas Motor Vehicle Commission Code. Currently, the rule indicates that the statutory definition of "representative" is found at Texas Motor Vehicle Commission Code §1.03(7), when it is actually found at §1.03(31), pursuant to recent legislation. The amendment to this rule will correct the citation by generally referring to §1.03 of the Texas Motor Vehicle Commission Code.

Section 103.4 is amended to reflect recent legislative changes to the Texas Motor Vehicle Commission Code. Currently, upon the Board's receipt of an application for a new motor vehicle dealer's license, dealer licensees holding franchises for the sale of the same line-make of new motor vehicles who are located in the same county in which the proposed dealership site is located or in an area within 15 miles of the proposed dealership site have the right to notice of the application and the right to file a protest in opposition to the application and the granting of a license pursuant thereto. The amendment to this rule will limit the right as provided in the Texas Motor Vehicle Commission Code to the extent that the Board shall not give notice of the filing of an application for the relocation of an existing dealership

if the proposed relocation site is not farther than one mile from the site from which the dealership is being relocated, or if the dealership of the dealer licensee holding franchises for the sale of the same line-make of new motor vehicles is not closer to the proposed location than it is to the location from which the dealership is being relocated.

Section 103.2 is repealed to delete an obsolete provision of the agency rules regarding public access to agency records. The rule currently indicates that the records of the Board shall be public documents and open to inspection during regular office hours, unless the board or director determines that any specific portion of such records is made confidential or privileged by any applicable law, or if such records contain a secret process, information on the personal wealth or affairs of an individual, or the personnel records of any individual, publication of which could serve no bona fide purpose, in which case such records shall not be available for public inspection. The repeal of this rule will eliminate the appearance of conflict with the Texas Government Code, §552 (the Public Information Act or Open Records Act).

Brett Bray, Director, Motor Vehicle Division, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing of administering these rules.

Mr. Bray also has determined that the public benefit of correcting the citation in §103.1 and limiting the notice of protest and the protest right in §103.4 to be consistent with recent legislative amendments to the Texas Motor Vehicle Commission Code, and will benefit the public by conserving the time and resources of the agency, as well as those of the licensee body. Repealing §103.2 will benefit the public by eliminating potential confusion and conserving the time and resources of the agency, as well as those of the entities seeking information from the agency. There will be no effect on small businesses and no anticipated economic cost to persons who are required to comply with these sections as proposed.

Comments on the proposals may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas 78768, 512/416-4800. The Motor Vehicle Board will consider adoption of the proposals at its meeting on October 9, 1997. The deadline for receipt of comments on the proposed amendments is 5:00 p.m. on September 23, 1997.

16 TAC §103.1, §103.4

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules as necessary and convenient to effectuate the provisions of the Act and to govern practice and procedure before the agency.

Motor Vehicle Commission Code, §1.03 is affected by the proposed amendment to §103.1, and §4.06 is affected by the proposed amendment to §103.4. Texas Government Code, Chapter 552 is affected by the repeal of §103.2.

§103.1. Representative Defined.

To effectuate the Texas Motor Vehicle Commission Code, §1.03[(7)], the **Board** [commission] construes the definition of the term "representative" to be sufficiently broad to include regional, zone, or district executive personnel whose area of responsibility includes Texas, and whose duties include contracting motor vehicle dealers or dealership personnel, and every other person employed by a motor vehicle manufacturer or distributor, directly or indirectly, to call upon or contact motor vehicle dealers or dealership employees concerning new motor vehicle sales, advertising, service, parts, business management, used motor vehicle sales, and for any other purpose. The statutory definition is construed to not include office or clerical personnel, production personnel, etc., whose duties do not include contacting motor vehicle dealers or dealership employees.

§103.4. Notification of License Application; Protest Requirements.

(a) Upon receipt of an application for a new motor vehicle dealer's license, including an application filed with the **Board** [commission] by reason of the relocation of an existing dealership, **the Board shall not give notice of the filing of an application for the relocation of an existing dealership if the proposed relocation site is not farther than one mile from the site from which the dealership is being relocated, or if the dealership of the dealer licensee holding franchises for the sale of the same line-make of new motor vehicles is not closer to the proposed location than it is to the location from which the dealership is being relocated. However,** the **Board** [commission] shall give notice of the filing of such application to all **other** dealer licensees holding franchises for the sale of the same line-make of new motor vehicles who are located in the same county in which the proposed dealership site is located or in an area within 15 miles of the proposed dealership site. If the same line-make is not represented in the county or applicable 15-mile area, no notice shall be given. Any such dealer licensee holding a franchise for the sale of the same line-make of a new motor vehicle as proposed for sale in the subject application may file with the **Board** [commission] a notice of protest in opposition to the application and the granting of a license pursuant thereto, which notice shall be given in the following manner.

(1)-(3) (No change.)

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711250
Brett Bray
Director
Texas Motor Vehicle Commission
Proposed date of adoption: October 9, 1997
For further information, please call: (512) 463–8630

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16 TAC §103.2

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Motor Vehicle Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal is proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules as necessary and convenient to effectuate the provisions of the Act and to govern practice and procedure before the agency.

Motor Vehicle Commission Code, §1.03 is affected by the proposed amendment to §103.1, and §4.06 is affected by the proposed amendment to §103.4. Texas Government Code, Chapter 552 is affected by the repeal of §103.2.

§103.2. Records.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711251
Brett Bray
Director
Texas Motor Vehicle Commission
Proposed date of adoption: October 9, 1997
For further information, please call: (512) 463–8630

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Chapter 107. Warranty Performance Obligations

16 TAC §107.8, §107.10

The Texas Motor Vehicle Board proposes amendments to §107.8, concerning Decisions, and §107.10, concerning Compliance.

The amendments to §107.8 are required pursuant to action taken by the 75th Legislative Session, House Bill 2382, which, effective September 1, 1997, mandates regulation of towable recreational vehicle manufacturers, distributors, and dealers by the Motor Vehicle Board. These amendments are proposed to formally address the requirement of a reasonable allowance for the owner's or lessee's use of a towable recreational vehicle included in the Texas Motor Vehicle Commission Code, Texas Civil Statutes, Article 4413(36), §6.07(c), pertaining to the Lemon Law, and to develop a formula for calculating the allowance in cases where no evidence or insufficient evidence is presented by the parties on that issue.

The amendments to §107.10 are proposed to add a requirement for a manufacturer, distributor, or converter to affix a disclosure label, in addition to providing a disclosure statement, to the left front window of vehicles replaced or repurchased pursuant to a board order, or on vehicles reacquired under the lemon law of another jurisdiction and transferred to this state for the purpose of resale. In addition, on the transfer of the vehicle, a manufacturer, distributor, or converter is required to provide the board, in writing, the name, address and telephone number of the transferee within 60 days of the transfer.

Brett Bray, Director, Motor Vehicle Division has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Bray also has determined that the public benefit anticipated as a result of the proposed amendments to §107.8 will be to expedite lemon law hearings by simplifying the proof requirements relating to the reasonable allowance for use deduction or offset used in calculating the repurchase price of a lemon vehicle. In addition, Mr. Bray has determined that the public benefit anticipated as a result of the proposed amendments of §107.10 will be to ensure the first retail purchaser of a lemon vehicle is informed that it was reacquired by the manufacturer, distributor, or converter under a state lemon law program. There will be no effect on small businesses and no anticipated economic cost to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas 78768, 512/416-4800. The Motor Vehicle Board will consider adoption of the proposed amendments at its meeting on October 9, 1997. The deadline for receipt of comments on the proposed amendments is 5:00 p.m. on September 23, 1997.

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules necessary and convenient to effectuate the provisions of the act and to govern practice and procedure before the agency.

Motor Vehicle Commission Code, §6.07 is affected by the proposed amendments.

§107.8. Decisions.

Any decisions by the **board** [commission] and recommended decision by a hearing officer shall give effect to the presumptions provided the Texas Motor Vehicle Commission Code, §6.07(d), where applicable.

(1)-(4) (No change.)

(5) Except in cases where clear and convincing evidence shows that the vehicle has a longer or shorter expected useful life than 120 months, the reasonable allowance for the owner's use of the towable recreational vehicle shall be the greater of 10% of the repurchase price, as defined in paragraph (3) of this section, or that amount obtained by adding the following:

(A) The product obtained by multiplying the purchase price of the towable recreational vehicle, as defined in paragraph (3) of this section, by a fraction having as its denominator 120 months, except the denominator shall be 60 months, if the towable recreational vehicle is occupied on a full time basis, and having as its numerator the number of months from the time of delivery to the owner to the first report of the defect or condition forming the basis of the repurchase order; and

(B) 50% of the product obtained by multiplying the purchase price by a fraction having as its denominator 120 months, except the denominator shall be 60 months, if the towable recreational vehicle is occupied on a full time basis, and having as its numerator the number of months of ownership after the first report of the defect or condition forming the basis of the repurchase order. The number of months during the period covered in this paragraph shall be determined from the date of the first report of the defect or condition forming the basis of the repurchase order through the date of the board hearing.

(6) [(5)] Except in cases involving unusual and extenuating circumstances, supported by a preponderance of the evidence, where refund of the purchase price of a leased vehicle is ordered, the purchase price shall be allocated and paid to the lessee and the lessor, respectively as follows.

(A) The lessee shall receive the total of:

(i) all lease payments previously paid by him to the lessor under the terms of the lease; and

(ii) all sums previously paid by him to the lessor in connection with entering into the lease agreement, including, but not limited to, any capitalized cost reduction, down payment, trade-in, or similar cost, plus sales tax, license and registration fees, and other documentary fees, if applicable.

(B) The lessor shall receive the total of:

(i) the actual price paid by the lessor for the vehicle, including tax, title, license, and documentary fees, if paid by lessor, and as evidenced in a bill of sale, bank draft demand, tax collector's receipt, or similar instrument; plus

(ii) an additional 5.0% of such purchase price plus any amount or fee, if any, paid by lessor to secure the lease or interest in the lease;

(iii) provided, however, that a credit, reflecting all of the payments made by the lessee, shall be deducted from the actual purchase price which the manufacturer is required to pay the lessor, as specified in clauses (i) and (ii) of this subparagraph.

(C) When the commission orders a manufacturer to refund the purchase price in a lease vehicle transaction, the vehicle shall be returned to the manufacturer with clear title upon payment of the sums indicated in subparagraphs (A) and (B) of this paragraph. The lessor shall transfer title of the vehicle to the manufacturer, as necessary in order to effectuate the lessee's rights under this rule. In addition, the lease shall be terminated without any penalty to the lessee.

(D) Refunds shall be made to the lessee, lessor, and any lienholders as their interest may appear. The refund to the lessee under subparagraph (A) of this paragraph shall be reduced by a reasonable allowance for the lessee's use of the vehicle. A reasonable allowance for use shall be computed according to the formula in paragraph (4) **or (5)** of this section, using the amount in subparagraph (B)(i) of this paragraph as the applicable purchase price.

§107.10. Compliance.

Compliance with the **board's** [commission's] order will be monitored by the **board** [commission].

(1)-(3) (No change.)

(4) If complainant's vehicle is replaced or repurchased pursuant to a **board** [commission] order, the manufacturer, distributor, or converter shall, **prior to resale of such vehicle** [through its representative dealer], issue a disclosure statement in the format of Attachment 1 or on a form approved by the **board** [commission], [which must accompany the vehicle through the first retail purchase after the commission order]. **In addition, the manufacturer, distributor, or converter repurchasing or replacing the vehicle shall affix a disclosure label provided by or approved by the board to the left front window of the vehicle. Both the disclosure statement and the disclosure label shall accompany the vehicle through the first retail purchase after the board order. Neither the manufacturer, distributor, converter nor any person holding a license or general distinguishing number issued by the board under the Code or Chapter 503, Transportation Code, shall remove or cause the removal of the disclosure label until delivery of the vehicle to the first retail purchaser. A manufacturer, distributor or converter shall provide the board, in writing, the name, address and telephone number of the transferee to whom the manufacturer, distributor or converter, as the case may be, transfers the vehicle within 60 days of each transfer. Any manufacturer, distributor, converter, or holder of a general distinguishing number who violates this section is liable for a civil penalty or other sanctions prescribed by the Code.** In addition, the manufacturer, distributor, or converter must repair the defect or condition in the vehicle that resulted in the repurchase **or replacement** and issue, at a minimum, a basic warranty (12 months/12,000 mile, whichever comes first) on a form **provided by or** approved by the **board** [commission], which warranty shall be provided to the first retail purchaser of the vehicle following the **board** [commission] order.

(5) If a manufacturer, distributor, or converter brings a vehicle into this state, which has been reacquired under the lemon law of another jurisdiction, the manufacturer, distributor, or converter shall, prior to the first retail sale, issue a disclosure statement on a form provided by or approved by the board. In addition, the manufacturer, distributor, or converter shall affix a label provided by or approved by the board to the left front window of the vehicle. Both the disclosure statement and the disclosure label shall accompany the vehicle through the first retail purchase. Neither the manufacturer, distributor, converter nor any person holding a license or general distinguishing number issued by the board under the Code or Chapter 503, Transportation Code, shall remove or cause the removal of the disclosure label until delivery to the first retail purchaser. Any manufacturer, distributor, converter, or holder of a general distinguishing number who violates this section is liable for a civil penalty or other sanction prescribed by the Code.

(6) In the event of any conflict between this rule and the terms contained in a cease and desist order, the terms of the cease and desist order shall prevail.

(7)[(5)] The failure of any manufacturer, distributor, converter, or dealer to comply with a decision and order of the **board** [commission] within the time period prescribed in the order may subject the manufacturer, distributor, converter, or dealer to formal action by the **board** [commission] and the assessment of civil penalties or other sanctions prescribed by the Texas Motor Vehicle Commission Code for the failure to comply with an order of the **board** [commission].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711252
Brett Bray
Director
Texas Motor Vehicle Commission
Proposed date of adoption: October 9, 1997
For further information, please call: (512) 463–8630

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Chapter 111. General Distinguishing Numbers

16 TAC §§111.4, 111.8, 111.9, 111.11

The Texas Motor Vehicle Board proposes amendments to §111.4 concerning House Trailer, Travel Trailer, Towable Recreational Vehicle; §111.8 concerning Temporary Cardboard Tags; §111.9 concerning Metal Dealer License Plates and Temporary Cardboard Tags; and §111.11, concerning Sanctions.

The amendment to §111.4 is necessary pursuant to action taken by the 75th Legislative Session, House Bill 2382, which, effective September 1, 1997, mandates regulation of towable recreational vehicle manufacturers, distributors and dealers by the Motor Vehicle Board. Section 111.4 is amended to expand the definition of house trailer to include the new statutory definition of "towable recreational vehicle", and to eliminate the obsolete language regarding measurements.

The amendments to §111.8, §111.9, and §111.11, concerning the design and issuance of motor vehicle buyer temporary tags are necessary to comply with new law, passed in House Bill 1137 of the 75th Legislative Session, which allows for the issuance of one additional temporary cardboard tag under very specific and limited circumstances.

The proposed changes to §111.8 amend the design of the temporary cardboard tag so that the expiration date of the tag is more prominently featured than on the current design. These changes have the anticipated effect of aiding peace officers who must enforce laws regarding the use and time restrictions for these tags. Corresponding changes to the appendices of §111.8(b) are also proposed, and attached with the proposed amendments to this rule.

Proposed changes to §111.9 amend subsection (c) to clarify that dealer metal plates and temporary tags may not be displayed on commercial vehicles. Ordinary buyers temporary tags may be displayed on commercial vehicles, so long as the tag is issued in accordance with all other requirements listed in the section. Further, the Division also proposes changes to §111.9 subsections (h) through (k), regarding the design of initial, supplemental and charitable organization temporary tags. Each tag will have a different color, and will prominently feature the expiration date. These new designs have the anticipated effect of aiding peace officers to enforce tag use and time restrictions. Supplemental tags will be issued lawfully only for the purposes described in Transportation Code §503.063, as amended by House Bill 1137.

Proposed amendments to §111.11(a)(8) reiterate that a supplemental tag may be issued as provided for by law.

Brett Bray, Director, Motor Vehicle Division, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state or local government as a result of enforcing or administering the section.

Mr. Bray has also determined that the anticipated public benefit of amending §111.4 to clarify the definition of house trailer will eliminate potential confusion thus conserving the time and resources of the agency, as well as those of the licensee body. The benefit of amending §111.8, §111.9 and §111.11 will be the facilitation of law enforcement on time and use restrictions of the tags as these requirements were altered by House Bill 1137. There will be no effect on small businesses and no anticipated economic cost to persons who are required to comply with these sections as proposed. Mr. Bray also has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering these sections. There will be no effect on small businesses and no anticipated economic cost to persons who are required to comply with these sections as proposed.

Comments on the proposal may be submitted to Brett Bray, Director, Motor Vehicle Division, Texas Department of Transportation, P.O. Box 2293, Austin, Texas 78768, 512/416-4800. The Motor Vehicle Board will consider adoption of the proposed amendments at its meeting on October 9, 1997. The deadline for receipt of comments on the proposed amendments is 5:00 p.m. on September 23, 1997.

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules necessary and convenient to effectuate the provisions of the Act and to govern practice and procedure before the agency.

Transportation Code, §503 is affected by the proposed amendments.

§111.4. House Trailer; Travel Trailer; ***Towable Recreational Vehicle****.*

The **terms "house trailer" or "travel trailer",** [term house trailer/ travel trailer] for the purpose of the sections under this chapter**,** shall mean a vehicle without automotive power designed for human habitation and for carrying persons and property upon its own structure and for being drawn by a motor vehicle [if that vehicle is less than eight body feet in width and less than 40 body feet in length, excluding the hitch, or the vehicle shall be 400 square feet or less when measured at the largest horizontal projections]. **Towable recreational vehicles as defined in the Texas Motor Vehicle Commission Code are included in the terms "house trailer" or "travel trailer".**

§111.8. Temporary Cardboard Tags.

(a) Motor vehicle, travel trailer, and trailer/semitrailer tags shall be printed on not less than six-ply cardboard with bolt holes to be horizontally punched on seven-inch centers and vertically punched on 4 1/2-inch centers and the numerals [and letters] in the [dealer number] **expiration date**shall not be less than two inches high. Motorcycle tags shall be printed on not less than six-ply cardboard with bolt holes to be horizontally punched on 5 3/4-inch centers and vertically punched on 2 3/4-inch centers and the numerals [and letters] **in the expiration date** shall not be less than one-inch high. Homemade cardboard tags or cardboard tags which have buyer's tag information printed on one side and dealer's tag information printed on the other side are not acceptable.

(b) The following appendices indicate the design and the instructions for printing and use of each of the respective temporary tags:

(1) Appendix A-1 - Dealer (design); Appendix A-2 - Dealer (instructions).

(2) Appendix B-1 - Buyer - **Initial** (design); Appendix B-2 - Buyer - **Initial** (instructions);

(3) Appendix B-3 - Buyer - Supplemental (design); Appendix B-4 - Buyer -Supplemental (instructions);

(4)[(3)] Appendix C-1 - Charitable (design); Appendix C-2 - Charitable (instructions).

§111.9. Metal Dealer License Plates and Temporary Cardboard Tags.

(a)-(b) (No change.)

(c) Metal dealer license plates and **dealer's** temporary cardboard tags may not be displayed on laden commercial vehicles being operated or moved upon the public streets or highways or on the dealer's service or work vehicles.

(1)-(3) (No change.)

(d)-(e) (No change.)

(f) A buyer's temporary cardboard tag **or supplemental tagmay not be displayed on any vehicle being operated upon the public streets and highways for which a sale has not been consummated.**

(g) (No change.)

(h) A dealer may have printed red initial temporary buyer's cardboard tags, blue supplemental tags and green charitable organization tags according to the specifications of Appendices B-1 through C-2. Upon receipt from the printer a dealer must immediately fill in a sequential control number on each tag.

(i)[(h)] A dealer shall maintain a record of all dealer metal plates issued to that dealer **and temporary cardboard buyer's and charitable organization tags,** and as to each vehicle such record shall consist of:

(1) the assigned metal plate number **or temporary cardboard tag control number;**

(2) the make;

(3) the vehicle identification number; [and]

(4) the name of the person in control[.] **; and**

(5) the name off the person issuing the tag; and

(6) the date sold and/or date issued and expiration date.

(j)[(i)] The dealer's record as referenced in subsection (h) of this section, shall be available at the dealer's location during normal working hours for review by a representative of the department. Dealer metal plates which cannot be accounted for shall no longer be valid for use and shall be voided.

(k) At the expiration of an initial red buyer's temporary cardboard tag, a supplemental blue temporary cardboard buyer's tag may be issued as provided for in the Transportation Code, §503.063.

(l)[(j)] A charitable organization tag is valid for a period of 30 days from the date of issuance.

§111.11. Sanctions.

(a) Revocation/Denial. The director may deny, revoke or suspend a dealer's license (general distinguishing number) if that dealer:

(1)-(7) (No change.)

(8) **except as provided by law,** issues more than one buyer's temporary cardboard tag for the purpose of extending the purchaser's operating privileges for more than [20] **21**days;

(9)-(23) (No change.)

(b)-(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711247
Brett Bray
Director
Texas Motor Vehicle Commission
Proposed date of adoption: October 9, 1997
For further information, please call: (512) 463–8630

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TITLE 19. EDUCATION

Part I. Texas Higher Education Coordinating Board

Chapter 5. Program Development

Subchapter A. General Provisions

19 TAC §5.9

The Texas Higher Education Coordinating Board proposes to new §5.9, concerning General Provisions (Uniform Admission Policy). The proposed changes are being made to help clarify language in House Bill 588 regarding the establishment of a uniform admissions policy. There was not previously a law establishing a uniform admissions policy.

Roger Elliott, Assistant Commissioner for Research and Financial Planning has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Elliott also has determined that for the first five years the rule is in effect the public benefit will be that it would free up that the rule is intended to clarify HB 588 and allow uniform implementation of HB 588 across universities as it applies to the 10% rule. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Dr. Kenneth H. Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The new section to the rules is proposed under HB 588, 75th legislative session and Texas Education Code, §51.807 which provides the Texas Higher Education Coordinating with the authority to adopt rules concerning General Provisions (Uniform Admission Policy).

There were no other sections or articles affected by the proposed amendments.

§5.9. Uniform Admission Policy.

(a) Each general academic teaching institution as defined by Texas Education Code, §61.003 shall admit first-time freshmen students for each semester in accordance with Texas Education Code, Chapter 51, Subchapter S.

(b) All applicants from Texas schools accredited by a generally recognized accrediting agency and who graduate in the top ten percent of their high school class shall be admitted to a general academic institution if the student meets the following conditions:

(1) The student graduated from high school within the two years prior to the academic year for which the student is applying, and;

(2) The student submitted a complete application as defined by the institution before the expiration of the institution's established deadline.

(c) High school rank for students seeking automatic admission to a general academic teaching institution on the basis of their class rank is determined and reported as follows:

(1) Class rank shall be based on the end of the 11th grade, middle of the 12th grade, or at high school graduation, whichever is most recent at the application deadline.

(2) The top ten percent of a high school class shall not contain more than ten percent of the total class size.

(3) The student's rank shall be reported by the applicant's high school or school district as a specific number out of a specific number total class size.

(4) Class rank shall be determined by the Texas school or school district from which the student graduated or is expected to graduate.

(d) Each general academic teaching institution shall annually report to the Board the composition of the entering class of first-time freshmen students admitted under Texas Education Code, §§51.803, 51.804, and 51.805. The report shall include a demographic breakdown of the class including race, ethnicity, and economic status. Each general academic teaching institution shall provide this report to the Board annually on or before a date set by the Board and in a manner prescribed in the "Instructions for Completing Texas Educational Opportunity (TXP)" form.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 18, 1997.

TRD-9711052
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: October 17, 1997
For further information, please call: (512) 483-6162

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Chapter 17. Campus Planning

Subchapter C. Requesting Coordinating Board Endorsement of Real Property Acquisitions

19 TAC §17.65

The Texas Higher Education Coordinating Board proposes amendments to §17.65, concerning Requesting Coordinating Board Endorsement of Real Property Acquisitions. The proposed changes are being made to bring Board rules in line with state law. The 74th Legislature removed a requirement that land purchase requests funded by Higher Education Assistance Funds proposed within three months of the start of a legislative session be brought to the legislature for approval. The proposed change removes this requirement from our Board rules. These land purchase requests would be submitted to the Board as is normally required.

Don Brown, Deputy Commissioner has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Brown also has determined that for the first five years the rule is in effect the public benefit will be that it would free up the Legislature from having to review and approve projects which the Board normally endorses. All land purchase requests would follow the standard review and approval process. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Dr. Kenneth H. Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rules are proposed under Texas Education Code, §62.021(b) and House Bill 2462, 74th Legislative Session which provides the Texas Higher Education Coordinating with the authority to adopt rules concerning Requesting Coordinating Board Endorsement of Real Property Acquisitions.

There were no other sections or articles affected by the proposed amendments.

§17.65. Procedure for Endorsement of Real Property Acquisition.

(a) **The** [Except for projects covered by paragraph (c) the] application procedure shall consist of two stages as follows:

(1)-(3) (No change.)

(b) (No change.)

[(c) In accordance with Texas Education Code, §62.021(b), any land acquisition project to be paid for with proceeds from the Higher Education Assistance Fund, and proposed for Coordinating Board endorsement within three months before the start of a regular legislative session, shall be automatically referred to the legislature for consideration.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 18, 1997.

TRD-9711053
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: October 17, 1997

For further information, please call: (512) 483-6162

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Chapter 21. Student Services

Subchapter A. General Provisions

19 TAC §21.5

The Texas Higher Education Coordinating Board proposes amendments to §21.5, concerning General Provisions (Refund of Tuition and Fees at Public Community/Junior and Technical Colleges. The amendments are being made to the rules to clarify that the minimum refund would be mandatory fees and tuition in excess of the minimum tuition; and prior to the census date, the institution may allow hours to be dropped and re-added without penalty to the student if the exchange is an equal one.

Sharon Cobb, Assistant Commissioner for Student Services has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Ms. Cobb also has determined that for the first five years the rule is in effect the public benefit will be that the institutions will have the option of retaining all or a portion of the minimum tuition to cover expenses that are incurred whether or not the student drops the course. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Dr. Kenneth H. Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rules are proposed under Texas Education Code, §61.061 and §130.001 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning General Provisions (Refund of Tuition and Fees at Public Community/Junior and Technical Colleges.

There were no other sections or articles affected by the proposed amendments.

§21.5. Refund of Tuition and Fees at Public Community/Junior and Technical Colleges.

(a) A community/junior or technical college, as soon as practicable, shall **at a minimum** refund mandatory fees and tuition **in excess of the minimum tuition** collected for courses from which the students drop or withdraw, according to the following schedule. For courses which meet on what the college considers a regular schedule, class days refer to the number of calendar days the institution normally meets for classes, not the days a particular course meets. For courses which meet on an unusual or irregular schedule, the college may exercise professional judgement in defining a class day. The indicated percentages are to be applied to the tuition and mandatory fees collected for each course from which the student is withdrawing. The college may not delay a refund on the grounds that the student may withdraw from the institution or unit later in the semester or term. The institution may assess a nonrefundable $15 matriculation fee if the student withdraws from the institution before the first day of classes.

(1)-(2) (No change.)

(b) (No change.)

(c) Prior to the census date, community and technical colleges may allow hours to be dropped and re-added without penalty to the student if the exchange is an equal one. When the charges for dropped hours are greater than for the hours added, the refund policy outlined above is to be applied to the net charges being dropped. If the charges for hours being added exceed the charges for hours being dropped, the student must pay the net additional charges.

(d)[(c)] Separate withdrawal refund schedules may be established for optional fees such as intercollegiate athletics, cultural entertainment, parking and yearbooks.

(e) [(d)] A community/junior or technical college shall refund tuition and fees paid by a sponsor, donor, or scholarship to the source rather than directly to the student who has withdrawn if the funds were made available through the institution.

(f)[(e)] A community/junior or technical college may terminate student services and privileges, such as health services, library privileges, facilities usage, and athletic and cultural entertainment tickets when a student withdraws from the institution.

(g)[(f)] If a student withdraws because the student is called into active military service, the institution, at the student's option, shall:

(1)-(3) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 18, 1997.

TRD-9711054
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: October 17, 1997
For further information, please call: (512) 483-6162

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Subchapter M. Texas College Work-Study Program

19 TAC §21.409, §21.410

The Texas Higher Education Coordinating Board proposes amendments to §21.409 and §21.410, concerning Texas College Work-Study Program. The proposed changes are being made to make definitions consistent with those used in other Coordinating Board programs; allow all funds to be distributed to the institutions at the beginning of the year; and clarify that failure to meet Board reporting or refund requirements in a timely manner may result in a loss of a portion or all funds allocated through this program to the institution. The amendments are being made to eliminate unnecessary disbursements and to streamline the process.

Sharon Cobb, Assistant Commissioner for Student Services has determined that for the first five-year period the rule is in effect

there will be no fiscal implications as a result of enforcing or administering the rule.

Ms. Cobb also has determined that for the first five years the rule is in effect the public benefit will be that unnecessary disbursements will be eliminated and the process will be streamlined. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Dr. Kenneth H. Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rules are proposed under Texas Education Code, §56.077, which provides the Texas Higher Education Coordinating with the authority to adopt rules concerning Texas College Work-Study Program.

There were no other sections or articles affected by the proposed amendments.

§21.409. Allocation and Disbursement of Funds.

(a) Funds will be allocated to schools proportionately to the financial need of the students at each school. **At the beginning of each year, the year's full allocation will be provided to each participating institution for use in reimbursing students for their work.**

[(1) Public Universities, Public Health Science Centers and Texas State Technical Institutes. At the beginning of each year, the funds allocated for students at each institution will be transferred to special cost center accounts at the State Treasury, to be drawn down as needed to meet salary expenditures.]

[(2) Public Junior Colleges and Independent Institutions. At the beginning of each year, schools will be disbursed 50% of their annual allocations. Upon certification by the program officer that 30% of the original funds disbursed to the schools have been expended, an additional fourth of the annual allocation will be sent to the school. The final fourth will be sent when 80% of the funds previously disbursed to the school have been certified as expended.]

(b)-(c) (No change.)

§21.410. Reporting Requirements.

Reports showing the utilization of funds must be submitted to the Board by the participating institution and any funds disbursed to the institution but not disbursed to eligible students must be returned to the Board upon its request. **Failure to meet Board reporting or refund requirements in a timely manner may result in a loss of a portion or all funds allocated through this program to the institution for the following year.**

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 18, 1997.

TRD-9711055
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: October 17, 1997
For further information, please call: (512) 483-6162

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Subchapter AA. Reciprocal Educational Exchange Program

19 TAC §§21.901-21.907, 21.909

The Texas Higher Education Coordinating Board proposes amendments to §§21.901-21.907, and 21.909, concerning Reciprocal Educational Exchange Program. The amendments are being made to include all nations and to clarify the tuition rate and payment. Texas students attending colleges in other nations may be allowed to register and pay a resident rate at that institution. In the past, this program was limited to the United Mexican States and Canada.

Sharon Cobb, Assistant Commissioner for Student Services has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Ms. Cobb also has determined that for the first five years the rule is in effect the public benefit will be that several payment arrangements may be made, but in general, foreign students coming to Texas through this program may be eligible to pay a tuition rate equal to that charged a Texas resident. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Dr. Kenneth H. Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rules are proposed under Texas Education Code, §54.060 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Reciprocal Educational Exchange Program.

There were no other sections or articles affected by the proposed amendments.

§21.901. Purpose.

The purpose of the reciprocal educational exchange program is to encourage students, faculty and staff of participating institutions to better understand the culture, language, needs and expectations of **other nations of the world** [the United Mexican States, Canada] and the State of Texas.

§21.902. Delegation of Powers and Duties.

Texas Education Code, §54.060(c), provides that the Coordinating Board shall establish a program [with the United Mexican States and Canada] for the exchange of students, faculty and staff between **Texas** institutions of higher education **and institutions in other nations of the world**.

§21.903. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

Citizen of Another Nation-A citizen or permanent resident of a nation other than the United States who resides in the nation of which he or she is a citizen or permanent resident and who plans to return

to that nation to live immediately after finishing his/her program of study in Texas.

[Citizen of Canada-A citizen or permanent resident of Canada who resides in Canada and who plans to return to Canada to live immediately after finishing his/her educational program.]

[Citizen of Mexico-A citizen or permanent resident of Mexico who resides in Mexico and who plans to return to Mexico to live immediately after finishing his/her educational program.]

Participating Nation-A nation other than the United States with institutions which have entered into exchange agreements with one or more institutions of higher education in Texas under the provisions of this subchapter.

§21.904. Eligible Institutions.
An institution eligible to participate in the exchange program must:

(1) be a public or private degree-granting institution of higher education located in **a nation other than the United States** [Canada or the United Mexican States] whose programs have recognition of official validity, or

(2)-(3) (No change.)

§21.905. Eligible Participants.
A person is eligible to participate in the exchange program if he/she:

(1) (No change.)

(2) is a citizen **or permanent resident of a participating nation** [of Mexico or Canada] or an individual enrolled in a public institution of higher education in Texas;

(3)-(5) (No change.)

§21.906. Tuition Rate to be Paid.

(a) **If a reciprocal exchange program requires a tuition payment, the tuition rate to be paid by participants will be either the resident rate paid at Texas institutions or the rate normally charged nationals or residents of other nations by their institutions. Resident rates paid by participants will be defined by the agreements entered into by the participating institutions. The method of charging and collecting tuition is to be negotiated between the two institutions involved in the exchange. The tuition rate and payment may be any of the following methods:**

(1) pay resident rate of receiving institution, paid to the receiving institution,

(2) pay resident rate of the originating institution, paid to the receiving institution, or

(3) pay resident rate of the originating institution, paid at the originating institution. [If the reciprocal exchange program involved requires a tuition payment, participating students, faculty or staff from Mexico and Canada will be eligible to enroll at the receiving Texas institution by paying a tuition rate equal to the resident rate of the receiving institution, paid to the receiving institution; an amount equal to the resident rate at the originating institution, paid to the receiving institution; or an amount equal to the resident rate at the originating institution, paid at the originating institution. Texas students, faculty or staff, participating in the exchange program must be allowed to pay a tuition rate no greater than the tuition rate normally charged nationals of Canada or Mexico at the receiving institution in Canada or Mexico, paid to that receiving institution; the tuition rate normally charged residents in Texas, paid to the receiving institution; or the tuition rate normally charged Texas residents, paid to the originating institution. The decision as to the method of charging and collecting tuition is to be negotiated between the two institutions involved in the exchange.]

(b) (No change.)

§ 21.907. Reciprocity.
The number of units of instruction exchanged would ideally be equal in any given year. If balance is not attained in any one year **and more students from other nations are participating in the program than are students from Texas,** parity is to be established within a five-year period.

§21.909. Reporting Requirements.
By October 31 of each year each participating Texas institution shall provide a program report to the Board on a form provided by the Board. The report shall include such things as the number of students, faculty or staff who have participated in the exchange program, **and** the names **and locations** of the institutions [in Canada or Mexico] with which the exchanges have taken place **.**[, the programs of study and any tuition or special classification code.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 18, 1997.

TRD-9711056
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: October 17, 1997
For further information, please call: (512) 483-6162

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Subchapter BB. Pilot Program for Enrolling Students from Mexico

19 TAC §§21.931, 21.932, 21.934, 21.935, 21.938

The Texas Higher Education Coordinating Board proposes amendments to §§21.931, 21.932, 21.934, 21.935, and 21.938, concerning Pilot Program for Enrolling Students from Mexico. The amendments are being made because of House Bill 1820, passed by the 75th Legislature. The amendments have been made to allow certain institutions (Texas Southmost College, Texas A&M University-Corpus Christi, and Texas State Technical College System) to enroll needy students from Mexico and waive the out-of-state tuition.

Sharon Cobb, Assistant Commissioner for Student Services has determined that for the first five-year period the rule is in effect the fiscal implications would be that an estimated cost of $178,000 will result from implementation of legislation allowing the waiver of out-of-state tuition to eligible students at these additional institutions. In fiscal year 1996, for students at institutions already participating in the waiver programs, 1,671 students in the Border County Program received waivers totaling $8,567,343, and 62 students in the Pilot Program received waivers totaling $263,023.

Ms. Cobb also has determined that for the first five years the rule is in effect the public benefit will be that needy students from

Mexico will be able to enroll in Texas Southmost College, Texas A&M University-Corpus Christi, and Texas State Technical College System and the out-of-state tuition will be waived. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Dr. Kenneth H. Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rules are proposed under Texas Education Code, §54.060 and House Bill 1820, 75th legislative session which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Pilot Program for Enrolling Students from Mexico.

There were no other sections or articles affected by the proposed amendments.

§21.931. Purpose.

The purpose of the pilot program is to encourage students from Mexico with limited financial resources to enroll in **certain** Texas public institutions of higher education [and to facilitate the completion of upper level and graduate degree programs by Mexican students enrolled in programs offered by general academic teaching institutions in counties adjacent to Mexico].

§21.932. Delegation of Powers and Duties.

(a) Texas Education Code, §54.060(b) and (d) provides that the Coordinating Board shall adopt rules governing a pilot program for needy students from Mexico who are eligible to pay resident tuition rates at general academic teaching institutions **and components of the Texas State Technical College System located** in counties not immediately adjacent to Mexico.

(b) The Board is also to determine the number of such students allowed to transfer from border county programs to other general academic teaching institutions **and components of the Texas State Technical College System** located throughout the state.

§21.934. Eligible Institutions.

Any general academic teaching institution **or component of the Texas State Technical College System** as defined in Texas Education Code, §61.003 is eligible to participate in the pilot program.

§21.935. Border County Program.

A border county program is an [An] instructional program offered in a county bordering Mexico by any general academic institution in Texas**, by a component of the Texas State Technical College System, by Texas A&M University-Kingsville, Texas A&M University-Corpus Christi or by Texas Southmost College** is a border county program.

§21.938. Numbers of Students Eligible to Participate in the Pilot Program.

(a) Each border county program **institution listed in §21.935** [and Texas A&M University-Kingsville] may enroll an unlimited number of eligible students.

(b) Each general academic teaching institution **or component of the Texas State Technical College System** not located in a county immediately adjacent to Mexico, except Texas A&M University-Kingsville **and Texas A&M University-Corpus Christi**, may enroll up to **two** [one] eligible **students** [student] per thousand of the institution's overall enrollment. Institutions with fewer than 5,000 students may enroll up to **ten** [five] eligible students.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 18, 1997.

TRD-9711057
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: October 17, 1997
For further information, please call: (512) 483-6162

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Subchapter II. Educational Aide Exemption Program

19 TAC §§21.1080–21.1091

The Texas Higher Education Coordinating Board proposes to new §§21.1080 - 21.1091, concerning Educational Aide Exemption Program. The amendments are being made to the rules because this a new exemption program, mandated by the 75th Legislature in House Bill 571. The program provides for a waiver of tuition and fees for certified educational aides. The purpose of the Educational Aide Exemption Program is to encourage certain educational aides to complete full teacher certification by providing need-based tuition and mandatory fee exemptions at Texas public institutions of higher education.

Sharon Cobb, Assistant Commissioner for Student Services has determined that for the first five-year period the rule is in effect the fiscal implications will be that it is estimated that approximately $3,500,000 will be available for the program in 1998, affecting state government.

Ms. Cobb also has determined that for the first five years the rule is in effect the public benefit will be that there will be more qualified teachers in Texas. The effect on state government will be approximately $3,500,000. There will be no effect on local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Dr. Kenneth H. Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rules are proposed under Texas Education Code, §54.214 and House Bill 571, 75th legislative session which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Educational Aide Exemption Program.

There were no other sections or articles affected by the proposed amendments.

§21.1080. Purpose.

The purpose of the Educational Aide Exemption Program is to encourage certain educational aides to complete full teacher certifica-

tion by providing need-based tuition and mandatory fee exemptions at Texas public institutions of higher education.

§21.1081. Administration.

The Texas Higher Education Coordinating Board, or its successor or successors, shall administer the Educational Aide Exemption Program.

§21.1082. Delegation of Powers and Duties.

The board delegates to the Commissioner of Higher Education the powers, duties and functions authorized by Texas Education Code Chapter 54, Subchapter D as provided in this subchapter.

§21.1083. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

Board-The Texas Higher Education Coordinating Board.

Commissioner-The commissioner of higher education, the chief executive officer of the board.

Cost of Attendance-A board-approved estimate of the expenses incurred by a typical financial aid student in attending college. Includes direct educational costs (tuition, fees, books, and supplies) as well as indirect costs (room and board, transportation, and personal expenses).

Financial need-The cost of attendance at an institution of higher education less the expected family contribution and any gift aid for which the student is entitled. The cost of education and family contribution are to be determined in accordance with board guidelines.

Program officer-The individual on a college campus who is designated by the institution's Chief Executive Officer to represent a program described in this subchapter on that campus. Unless otherwise designated by the Chief Executive Officer, the Director of Student Financial Aid shall serve as program officer.

Resident of Texas-A resident of the State of Texas as determined in accordance with Chapter 21, Subchapter B of title (relating to Determining Residence Status). Nonresident students eligible to pay resident tuition rates are not included.

§21.1084. Eligible Institution.

(a) All public institutions of higher education are eligible to participate.

(b) The chief executive officer of an eligible institution shall designate a program officer who shall be the board's on-campus agent to certify all institutional transactions, activities and reports with respect to the program described in this subchapter. Unless otherwise indicated by the chief executive officer of the institution, the Director of Financial Aid shall serve as the program officer.

§ 21.1085 Eligible Students.

To receive an award through the Educational Aide Exemption Program, a student must:

(1) be a resident of Texas;

(2) be certified as an educational aide by the Texas State Board for Educator Certification;

(3) have at least two school years of experience as a certified educational aide working directly in the classroom with students in a school district in Texas;

(4) be employed as a certified educational aide working directly in the classroom with students in a school district in Texas during the school year for which the person receives the award;

(5) show financial need;

(6) be enrolled in classes necessary for certification as a teacher at the institution granting an exemption under this subchapter;

(7) meet the academic progress standards of his/her institution; and

(8) follow application procedures and schedules as indicated by the board.

§21.1086. The Application Process.

(a) Application forms and instructions will be distributed primarily through school district offices throughout the state, although financial aid offices of eligible institutions will also be provided copies of the forms.

(b) Applications will be processed once a year, with award announcements made as soon as possible after the priority deadline named by the board.

(c) Part I of the application is to be completed and signed by the applicant, who is to forward the form to an authorized officer of the school or school district by which the applicant is employed.

(d) Part II of the application is to be completed and certified by an authorized officer of the school or school district by which the applicant is employed, who is to forward the application to the financial aid office of the college or university the applicant plans to attend.

(e) Part III of the application is to be completed and certified by the financial aid office of the relevant institution of higher education, which is responsible for forwarding the completed application to the board by the deadline indicated in the instructions.

(f) Due to limited funding, each institution will be allowed to submit only a certain number of applications to the board. This allotment will be announced to the institutions at least a month prior to the deadline for submitting applications.

(g) In order to be given priority consideration, applications with Parts I, II and III completed and duly certified must be received by the board by the established deadline. Applications received after that date will be given consideration only if funds remain available after all applications received by the deadline have been processed.

§21.1087. Selection Criteria.

From the pool of applicants submitted by participating institutions, the board will select recipients for the exemptions. Selection will be based on the following criteria:

(1) the financial need of each student,

(2) the number of years the individual has been employed as a certified educational aide,

(3) the priority assigned each applicant by the institution, and

(4) the student's anticipated date for certification as a teacher.

§21.1088. Award Announcements.

As soon as possible after the priority deadline for submitting applications, the board will select award recipients and announce the selections to the institutions, the selected recipients, and the school districts employing the recipients. The number of awards made each year will depend on the funding available for reimbursing institutions for the exemptions they grant. No institution is required to award an exemption for which reimbursement funds are not available.

§21.1089. Award Cycle.

(a) Fall awards. Each individual selected for an award through this subchapter will be exempted from the payment of tuition and mandatory fees other than class or laboratory fees for the fall term for which the award was requested.

(b) Spring awards. At the end of the fall term and upon confirmation by the institution that the student continues to be eligible, the student will also be granted an exemption for tuition and mandatory fees other than class or laboratory fees for the spring term of that same academic year.

(c) A summer exemption may be granted if program funding is sufficient to meet summer expenses and if the student continues to meet program requirements. The availability of funding for summer awards will be announced to institutions by the board by March 1 of each year.

(d) Students who have received awards may compete for awards in subsequent years but must follow the same application process as students applying for the first time.

§21.1090. Reimbursement for Exemptions.

(a) Source of funding. The funds to be used to reimburse institutions for the exemptions awarded under this subchapter will come from the foundation school fund.

(b) To request reimbursements. After granting exemptions authorized by the board, the institutions may request reimbursement from the board by completing and submitting the reimbursement form prescribed and distributed by the board.

(c) Reimbursements. At least once a year the board will request a transfer of funds from the foundation school fund for use in reimbursing participating institutions and forward amounts to institutions in keeping with the reimbursement forms received from the schools.

§21.1091. Program Review Requirements.

Any institution of higher education whose students receive awards through the program described in this subchapter will be subject to a program review.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711058
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: October 17, 1997
For further information, please call: (512) 483-6162

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Chapter 22. Grant and Scholarship Programs

Subchapter E. Texas New Horizons Scholarship Program

19 TAC §§22.81–22.86

The Texas Higher Education Coordinating Board proposes new §§22.81-22.86, concerning Texas New Horizons Scholarship Program. The amendments are being made to the rules because this a new scholarship program, mandated by the 75th Legislature in Senate Bill 576. The purpose of the program is to provide financial assistance to eligible high school graduates in the form of scholarships for the payment of tuition and mandatory fees at public institutions of higher education.

Sharon Cobb, Assistant Commissioner for Student Services has determined that for the first five-year period the rule is in effect the fiscal implications will be that it is estimated that approximately $1,506,990 will be available for the program in 1998, affecting state government.

Ms. Cobb also has determined that for the first five years the rule is in effect the public benefit will be that the program will assist deserving students from lower socioeconomic levels to attend college. The effect on state government will be approximately $1,506,990. There will be no effect on local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Dr. Kenneth H. Ashworth, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rules are proposed under Texas Education Code, §54.216 and Senate Bill 576, 75th legislative session which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Texas New Horizons Scholarship Program.

There were no other sections or articles affected by the proposed amendments.

§22.81. Purpose.

The purpose of the Texas New Horizons Scholarship Program is to provide financial assistance to eligible high school graduates in the form of scholarships for the payment of tuition and mandatory fees at public institutions of higher education.

§22.82. Eligible Institutions.

All public institutions of higher education are eligible to participate. To participate, however, an eligible institution must match state funds with the institution's local or institutional funds.

§22.83. Eligible Students.

To be eligible, a student must meet the general eligibility criteria outlined in the general provisions of this chapter. In addition, the student must not have received a baccalaureate degree and must not be receiving an athletic scholarship.

§22.84. Selection of Recipients.

In the initial selection of recipients, institutions are to give priority consideration to applicants who meet the criteria listed below. The board will advise institutions as to the relative weight to be given

each of the criteria. In addition, priority may be given to prior year recipients as long as they continue to meet the eligibility requirements of the program. The selection criteria are:

(1) the applicant's socioeconomic background, which suggests disadvantages in preparing for college, measured in terms of the student's family income relative to the designated poverty level of income and whether or not the family has been receiving some type of welfare assistance;

(2) the relative wealth of the school district in which the student graduated from high school, compared to the average wealth of school districts throughout the state;

(3) one or more of the following criteria, as determined by the institution attended by the student:

(A) levels of responsibility demonstrated by the student through work at school, in the community, the family or with an outside job to help support the family while attending high school, as attested to via recommendations from at least two disinterested third parties;

(B) the applicant's performance on standardized tests, as compared to the performance of other students with similar socioeconomic backgrounds;

(C) whether the student's parents ever attended college; and,

(D) the applicant's performance on standardized tests compared to the performance of all applicants for an award under this subchapter.

§22.85. Award Amounts.

An eligible student may receive a scholarship equal to his or her tuition and mandatory fee charges for up to one academic year.

§22.86. Funding.

Out of funds appropriated for the Texas New Horizons Scholarship Program, the Commissioner shall allocate funds to eligible institutions in proportion to the unmet financial need of their students. Institutions must send to the board local or institutional funds of an amount at least equal to the amount of state funds provided. Individual student awards will be issued, with half of the funds coming from state appropriations and half from funds deposited by the institution.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711063
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: October 17, 1997
For further information, please call: (512) 483-6162

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TITLE 22. EXAMINING BOARDS

Part XX. Texas Board of Private Investigators and Private Security Agencies

Chapter 428. Guard Dog Company

22 TAC §§428.3–428.6, 428.8

The Texas Board of Private Investigators & Private Security Agencies proposes amendment to §428.3 through §428.6 and §428.8 concerning Personal Protection Authorization. This amendment clearly defines the Level Four training course which is required for obtaining a Personal Protection Authorization. The Board has determined that this amendment is necessary in order clarify the training requirements for personal protection officers.

Larry R. Shimek has determined that for the first five-year period the rule are in effect there will be no fiscal implications for state government as a result of enforcing or administering the rule. There will be no fiscal implications for local government.

Larry R. Shimek has determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule as proposed will be to ensure that all personal protection officers are qualified and receive adequate training. The effect on small businesses will be minimal. The anticipated economic cost to individuals who are required comply with the rule as proposed will be none.

Comments on the proposal may be submitted to Larry R. Shimek, Texas Board of Private Investigators & Private Security Agencies, P.O. Box 13509, Austin, TX 78711.

This amendment is proposed under 4413(29bb) V.A.C.S., Section 11.(a)(3) which provides the Texas Board of Private Investigators & Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the statute that is affected by this rule: Texas Civil Statutes, Article 4413 (29bb).

*§428.3 Board Approved Personal Protection Officer Instructor/ Level Four Training/Approved **Personal Protection** [Commissioned Security] Officer Training Schools*

(a) The personal protection officer course must be offered by Board approved **personal protection** [commissioned security] officer training schools and taught by Board approved Personal Protection Officer Instructors who are employed by the approved school. Personal Protection Officer Training Instructors must be approved to instruct Level Four training. To receive Board approval, a school or instructor must submit an application to the Board on a form provided by the Board. Any person applying for approval as an instructor shall submit proof of qualification as required by the Board. Proof of qualification as an instructor shall include, but not be limited to, the following:

(1) (No Change.)

(2) (No Change.)

(3) (No Change.)

(4) (No Change.)

(5) (No Change.)

(b)-(d) (No Change.)

§428.4 Level Four Training (Personal Protection Officer Training Course)

[(a)] The Personal Protection Officer Training Course shall consist of a minimum of 15 classroom hours and shall be offered by Board approved **personal protection officer** training schools and taught by Board approved personal protection training instructors. All training shall be conducted with **a** Board approved instructor present during all instruction. All students of a Personal Protection Officer Training Course shall be tested with an examination prepared by and obtained from the Board. [Board official Personal Protection Officer Training Video Tapes shall be obtained from the Board and used as the curriculum.]LEVEL FOUR TRAINING COURSE

(1) (No Change.)

(2) (No Change.)

(3) (No Change.)

(4) (No Change.)

(5) (No Change.)

[(b) Personal Protection Officer training video tapes will be prepared by Board staff and selected experts in the field of nonlethal self-defense and nonlethal self-defense of a third party.]

*§428.5 [Personal Protection Officer Training Video Tapes,] Examination, [and] Grade **, and Progress of Students***

[(a)The Board's official Personal Protection Officer Training Video Tapes shall be used by all Board approved schools and instructors as their curriculum and shall be obtained from the Board.]

(a) [(b)] All students of a Personal Protection Officer Training Course shall be tested with an examination prepared by and obtained from the Board.

(b) [(c)] The passing grade of the Personal Protection Officer Training Course shall be a minimum of 70% correct answers on academic studies and must meet the minimum standards as set forth by the approved instructor on practical simulations.

§428.6 Certificate of Completion

(a) The certificate of completion shall contain the:

(1) name and approval number of the **personal protection officer training** school;

(2)-(6) (No Change.)

(b) (No Change.)

(c) Certificates of completion shall be issued by a Board approved **personal protection officer** training school.

§428.8 Requirements for Issuance of a Personal Protection Authorization.

(a) An applicant for Personal Protection Authorization shall:

(1)-(5) (No Change.)

(6) submit proof that the applicant has successfully completed the Personal Protection Officer Course taught by a Board approved Personal Protection Officer **Training School and** Instructor;

(7)-(8) (No Change.)

(b) (No Change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 13, 1997.

TRD-9711079
Larry R. Shimek
Acting Executive Director
Texas Board of Private Investigators and Private Security Agencies
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–5545

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Chapter 429. Application and Examination

22 TAC §429.2

The Texas Board of Private Investigators & Private Security Agencies proposes amendments to §429.2 concerning Examination. The Board has determined that this amendment is necessary to clarify the requirement for licensed alarm company managers. This amendment states that a manager of a licensed alarm company must take the Board's manager examination as well as the Alarm Level One training course in order to qualify.

Larry R. Shimek has determined that there will be no fiscal implications for state and local government as a result of enforcing or administering the rule.

Larry R. Shimek has determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule as proposed will be alarm company managers who have been trained and tested on the Act and Board Rules in addition to specific technical training regarding alarm systems. There will be no effect on small businesses. The anticipated economic cost to individuals who are required to comply with the rule as proposed will be none.

Comments on the proposal may be submitted to Larry R. Shimek, Texas Board of Private Investigators & Private Security Agencies, P.O. Box 13509, Austin, TX 78711.

This amendment is proposed under Article 4413 (29bb) V.A.C.S. Section 11.(a)(3) which provides the Texas Board of Private Investigators & Private Security Agencies with the authority "to promulgate all rules and regulations necessary in carrying out the provisions of this Act."

The following is the statute that is affected by this rule: Texas Civil Statutes, Article 4413(29bb).

§429.2 Examination

(a) (No change.)

(b) (No change.)

(c) The examination shall cover **all sections of** the Act and Board Rules as specific testing on all categories of licensure **.** [; except that] **In addition,** in the case of an alarm systems company category, [the specific testing shall not apply and] a certificate of completion issued by a Board approved alarm installer training school shall be provided in order to qualify for the category of alarm systems company.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 13, 1997.

TRD-9711078
Larry R. Shimek
Acting Executive Director
Texas Board of Private Investigators and Private Security Agencies
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–5545

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Part XXI. Texas State Board of Examiners of Psychologists

Chapter 463. Applications

22 TAC §463.5

The Texas State Board of Examiners of Psychologists proposes an amendment to §463.5, concerning Application File Requirements. The amendment is being proposed in order to clarify that any applicant for licensure as a specialist in school psychology must have attained a graduate degree that meets the requirements of the Psychologists' Certification and Licensing Act, §26.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Lee also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to make the rules easier to follow and to ensure that all licensees and the general public are aware of the Board's requirements for licensure as a specialist in school psychology. There will be no effect on small businesses. The anticipated economic cost to person who are required to comply with the rule as proposed will be in direct proportion to any cost incurred in obtaining required documentation.

Comments on the proposal may be submitted to Janice C. Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700.

This amendment is proposed under Texas Civil Statutes, Article 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles or codes.

§463.5. Application File Requirements.

An application file must be complete and contain whatever information or examination results the Board requires. An incomplete application remains in the active file for 90 days, at the end of which time, if still incomplete, it is void. If certification or licensure is sought again, a new application and filing fee must be submitted. No applicant can have more than one application as described in paragraphs (2), (3) and/or (5) of this section pending before the Board at one time. For any applicant against whom a complaint is filed with this Board, any final decision on the application will be held in abeyance until the Board has made a final determination on the complaint filed. If the complaint is not resolved within 180 days after an application has been held in abeyance, the Board shall review the complaint and make a determination as to whether to issue the license notwithstanding the complaint. In making the determination, the Board shall consider any relevant factor, including the potential for harm to the public if the license is granted, and the nature and severity of the allegations. The applicant will be permitted to take all required exams as scheduled but will not be certified or licensed until approved by the Board.

(1) - (5) No change

(6) Licensed Specialist in School Psychology. A completed application for licensure as a specialist in school psychology includes one of the following, in addition to the requirements set forth in paragraph (1) of this section:

(A) Documentation of an appropriate graduate degree; and

(B) [(A)] Documentation from the National School Psychologists' Certification Board sent directly to the Board indicating the applicant holds current valid certification as a National Certified School Psychologist; or

(C) [(B)] Documentation of the following sent directly to the Board:

(i) transcripts that verify that the applicant has met the requirements set forth in §463.32 of this title (relating to Licensed Specialist in School Psychology);

(ii) proof of the internship required by Board Rule §463.32 of this title (relating to Licensed Specialist in School Psychology) if the applicant did not graduate from either a training program approved by the National Association of School Psychologists or a training program in school psychology accredited by the American Psychological Association; and

(iii) the score that the applicant received on the School Psychology Examination sent directly from the Education Testing Service.

(7) - (9) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711075
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 305–7700

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Chapter 465. Rules of Practice

22 TAC §465.38

The Texas State Board of Examiners of Psychologists proposes an amendment to §465.38, concerning Psychological Services in the Schools. The amendment is being proposed in order to clearly state who may use the title of Licensed Specialist

in School Psychology and to clarify the qualifications of a supervisor.

Sherry L. Lee, Executive Director, has determined that for the first five-year period the section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Lee also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be to ensure that the licensees of the Board and the public are aware of the requirements regarding the practice of psychology in the public school districts of Texas. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted to Janice C. Alvarez, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Suite 2-450, Austin, Texas 78701, (512) 305-7700.

The amendment is proposed under Texas Civil Statutes, Article 4512c, which provide the Texas State Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

The proposed amendment does not affect other statutes, articles, or codes.

§465.38. Psychological Services in the Schools.

This rule acknowledges the unique difference in the delivery of school psychological services in the public schools from psychological services in the private sector. The Board recognizes the purview of the State Board of Education and the Texas Education Agency in safeguarding the rights of public school children in Texas. The mandated multidisciplinary team decision making, hierarchy of supervision, regulatory provisions, and past traditions of school psychological service delivery both nationally and in Texas, among other factors, allow for rules of practice in the public schools which reflect these occupational distinctions from the private practice of psychology.

(1) (No change.)

(2) Titles. The correct title for the person holding the Licensed Specialist in School Psychology is Licensed Specialist in School Psychology or LSSP. Only individuals who meet the requirements of §467.2 of this title (relating to Use of Specialty Titles) may refer to themselves as School Psychologists. No individual may use the title Licensed School Psychologist.

(3)[(2)] Providers of School Psychological Services. School psychological services may be provided in Texas public schools only by individuals authorized by this Board to provide such services. Individuals who may provide such school psychological services include licensed specialists in school psychology, interns or trainees as defined in §463.32 of this title (relating to Licensed Specialist in School Psychology) and individuals holding a temporary license issued by this Board to provide such services under §463.32 of this title. Nothing in this rule prohibits public schools from retaining licensed psychologists and licensed psychological associates who are not licensed specialists in school psychology to provide psychological services, other than school psychology, in their areas of competency.

(4)[(3)] Supervision.

(A) Direct systematic, face-to-face supervision must be provided to:

(i) **Interns** [Interns/Trainees] as defined in §463.32 of this title (relating to Licensed Specialist in School Psychology).

(ii) Individuals who meet the training requirements and have applied for licensure as specialists in school psychology. These individuals may practice under supervision [as trainees] in a public school district for no more than one year. **They must be designated as trainees.**

(iii) Licensed specialists in school psychology for a period of one academic year following licensure.

(iv) Licensed specialists in school psychology when the specialist is providing psychological services outside his or her area of training and supervised experience.

(B) Individuals licensed under the grandparenting provisions of §463.32 of this title (relating to Licensed Specialist in School Psychology) are exempt from the supervision requirement.

(C) Nothing in this rule applies to administrative supervision of psychology personnel within the public schools, often done by non-psychologists, in job functions involving, but not limited to, attendance, time management, completion of assignments, or adherence to school policies and procedures.

(5)[(4)] Supervisor Qualifications. Supervision **may only** [must] be provided by a licensed specialist in school psychology**, including an individual who has obtained licensure by grandparenting, who has** [with] a minimum of three years **of** experience providing psychological services in the public schools. **Any licensed specialist in school psychology may count one full year as an intern or trainee as one of the three years of experience required to perform supervision.**

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711076
Sherry L. Lee
Executive Director
Texas State Board of Examiners of Psychologists
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 305–7700

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TITLE 25. HEALTH SERVICES

Part II. Texas Department of Mental Health and Mental Retardation

Chapter 401. System Administration

Subchapter A. Advisory Committees

25 TAC §401.8

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes new §401.8, concerning advisory committees.

The proposal would establish the Inpatient Mental Health Services Advisory Committee in accordance with the Texas Health and Safety Code, §571.027. The statute requires the advisory committee to advise the Texas MHMR Board on issues and policies related to the provision of mental health services in private mental hospitals licensed by the Texas Department of Health (TDH) and psychiatric units of general hospitals licensed by TDH; on coordination and communication between TDMHMR, TDH, and these facilities to address consistency between the agencies in interpretation and enforcement of agency policies and other rules; and on training for surveyors or investigators.

Don Green, chief financial officer, has determined that for each year of the first five-year period the section as proposed is in effect there will be no significant fiscal impact on state and local governments or small businesses. There is no anticipated local employment impact.

Karen Hale, assistant commissioner, has determined that the public benefit is the coordination of activities between TDMHMR and the Texas Department of Health (TDH) related to the development of proposed policies and other rules and the interpretation and enforcement of adopted policies and other rules that relate to mental health services in private mental hospitals licensed by the Texas Department of Health (TDH) and psychiatric units of general hospitals licensed by TDH. There is no significant anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Linda Logan, director, Policy Development, Texas Department Mental Health and Mental Retardation, P.O. Box 12668, Austin, TX 78711-2668, within 30 days of publication.

The section is proposed under the Texas Health and Safety Code, Title 7, §532.015, which provides the Texas Mental Health and Mental Retardation Board with rulemaking powers and with the Texas Civil Statutes, Article 6252-33, §5, which requires the adoption of rules stating the purpose, tasks, and reporting mechanism of each committee that advises the board.

The proposal affects the Texas Civil Statutes, Article 6252-33 and the Texas Health and Safety Code, §571.027.

§401.8. Inpatient Mental Health Services Advisory Committee.

(a) The purpose of the Inpatient Mental Health Services Advisory Committee is to provide advice relating to the coordination of activities between TDMHMR and the Texas Department of Health (TDH) relating to the development of proposed policies and other rules and the interpretation and enforcement of adopted policies and other rules that relate to mental health services in private mental hospitals licensed by the Texas Department of Health (TDH) and psychiatric units of general hospitals licensed by TDH.

(b) Tasks of the Inpatient Mental Health Services Advisory Committee are to provide advice on:

(1) issues and policies related to the provision of mental health services in private mental hospitals licensed by the Texas Department of Health (TDH) and psychiatric units of general hospitals licensed by TDH;

(2) coordination and communication between TDMHMR, TDH, private mental hospitals licensed by the Texas Department of Health (TDH), and psychiatric units of general hospitals licensed by TDH to address consistency between the agencies in interpretation and enforcement of agency policies and other rules; and

(3) training for surveyors or investigators.

(c) This advisory committee shall be abolished on January 1, 2001, unless abolished on an earlier date or reauthorized.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711294
Ann Utley
Chairman , Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 206-4516

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25 TAC §401.9

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Mental Health and Mental Retardation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes the repeal of §401.9, concerning advisory committees.

The proposal would abolish the Treatment Methods Advisory Committee as allowed by the Texas Health and Safety Code, §571.0065(a).

Don Green, chief financial officer, has determined that for each year of the first five-year period the section as proposed is in effect there will be no significant fiscal impact on state and local governments or small businesses. There is no anticipated local employment impact.

Karen Hale, assistant commissioner, has determined that the public benefit is the retention of the Texas MHMR Board's authority to consider reports from agencies or individuals that have knowledge of or receive a complaint relating to an abusive treatment method, while eliminating the requirement for a committee, with specific membership and meeting requirements, that could not respond to treatment issues in a timely manner. There is no significant anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposed repeal may be submitted to Linda Logan, director, Policy Development, Texas Department Mental Health and Mental Retardation, P.O. Box 12668, Austin, TX 78711-2668, within 30 days of publication.

The section is proposed for repeal under the Texas Health and Safety Code, Title 7, §532.015, which provides the Texas

Board of Mental Health and Mental Retardation with rulemaking powers.

The proposal affects the Texas Health and Safety Code, §571.0065.

§401.9. Treatment Methods Advisory Committee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711295
Ann Utley
Chairman , Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 206-4516

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Chapter 409. Medicaid Programs

Subchapter D. Home and Community-based Services

25 TAC §§409.101, 409.103, 409.109, 409.114, 409.115, 409.119

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes amendments to §§409.101, 409.103, 409.109, 409.114, 409.115, and 409.119 of Chapter 409, Subchapter D, concerning Home and Community-Based Services (HCS).

The proposed amendments would require the transfer of initial ICF-MR level-of-care eligibility determinations for HCS applicants from the Texas Department of Human Services (TDHS) to TDMHMR to facilitate the timely processing of information; delete the requirement for a separate determination of mental retardation from the HCS eligibility criteria as redundant and unnecessary; incorporate the HCS Consumer Principles for Evidentiary Certification to provide the opportunity for public scrutiny and comment on standards affecting the rights of recipients and the procedures of providers; updating of sections of the rule to reflect current practices for correcting lapsed level of care determinations and the transfer of program provider contract administration from TDHS to TDMHMR; and correction of a typographical error inadvertently included in the last action on this rule.

Don Green, chief financial officer, has determined that for each year of the first five-year period the rule, as proposed, is in effect there will be a fiscal impact on TDMHMR of $87,852 and a corresponding reduction to TDHS. By year, additional cost to TDMHMR are as follows: $13,030 for FY 1999; $14,984 for FY 2000; $17,232 for FY 2001; $19,817 for FY 2002; and $22,789 for FY 2003. There will be no fiscal impact upon local governments or small business.

Ernest McKenney, director, Medicaid Administration, has determined that for each year of the first five years the amendments are in effect the public benefit anticipated will be a more streamlined HCS eligibility determination process and improved enforceability of program provider certification requirements. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There will be no effect on small business.

A public hearing will be held at 8:30 a.m. on September 18, 1997, in the auditorium of the main TDMHMR Central Office building (Building 2) at TDMHMR Central Office, 909 West 45th Street, Austin, Texas, to accept oral and written testimony concerning the proposal. Persons requiring an interpreter for the deaf or hearing impaired should notify Sheila Wilkins, Office of Policy Development, at least 72 hours prior to the hearing by calling (512) 206-4516.

Questions about the content of the proposal may be directed to Mr. McKenney. Comments on the proposed sections should be submitted to Linda Logan, director, Policy Development, Texas Department Mental Health and Mental Retardation, P.O. Box 12668, Austin, TX 78711-2668, within 30 days of publication.

The amended sections are proposed under the Health and Safety Code, §532.015(a), which provides TDMHMR with broad rulemaking authority; Human Resource Code, Chapter 32, §32.021, and Government Code, Chapter 531, §531.021, which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer federal medical assistance funds and administer the state's medical assistance program.

The section affects Human Resources Code, Chapter 32, and Government Code, Chapter 531, §531.021. DIVISION HEADINGS AND GENERAL RULES APPLICATION

§409.101. [Client] Eligibility Criteria.

(a) (No change.)

(b) To be determined eligible by TDMHMR for HCS services, **individuals** [clients] must also:

(1) meet the ICF-MR I, V, or VI level of care criteria as determined by [the] **TDMHMR or** TDHS according to [25 TAC] Chapter 406, Subchapter E[,] **of this title, concerning ICF/MR Program: Eligibility and Review,** and applicable federal regulations, and as verified by a current level of care (LOC) assessment form;

(A) **An LOC assessment** [An admission Level of Care Assessment] (or reassessment) form signed by **TDMHMR or** TDHS is considered valid for enrollment purposes by TDMHMR for 364 days from the date of issuance.

(B) Reevaluations of **level of care** [ICF-MR level-of-care criteria] are performed annually by the TDMHMR. An initial reevaluation of level of care must be performed no later than 364 calendar days from the date of enrollment. Subsequent **LOC** [level-of-care] reevaluations must be performed no later than 364 calendar days from the effective date of the prior level of care assignment.

(C) In order for payment to be considered for days that **an individual** [a client] was receiving HCS services but did not have a current LOC assessment form in place, the provider must follow the process described in §409.119 of this title (relating to Gaps in Level-of-Care Coverage);

(2) live in the contracted provider's geographic catchment area. If an applicant has been removed from his home and community

because of ICF-MR institutional placement, he may be considered for placement in the HCS program even though his original county of residence is outside the provider's geographic catchment area; **and**

[(3) have had a determination of mental retardation performed according to state law prior to enrollment into the HCS program; and]

(3) [(4)] have an Individual Plan of Care for Home and Community-based Services form developed by the provider's interdisciplinary team[; the team must be] composed of a case manager and nurse who meet the qualifications specified in the waiver, and the individual or legally authorized representative.

(A) The Individual Plan of Care for Home and Community-based Services form must specify the type of waiver services required to keep an individual in the community, the units of waiver services, and their frequency and duration.

(B) The Individual Plan of Care for Home and Community-based Services form must be signed and dated by the interdisciplinary team prior to implementation. The interdisciplinary team must certify in writing that the waiver services authorized on the Individual Plan of Care form are necessary to avoid ICF-MR institutional placement and are appropriate to meet the applicant's needs in the community, as recommended. The initial individual plan of care must be based upon the community support analysis (Exhibit A) developed by the **mental retardation authority** (MRA) according to §409.102 of this title (relating to Process for Applicant Referral to Contracted HCS Provider Agencies).

(C) The initial Individual Plan of Care for Home and Community-based Services form must be approved by TDMHMR. The Individual Plan of Care form must be updated by the provider at least annually. Revisions and updates to the Individual Plan of Care form are subject to review and approval during annual on-site certification and other reviews conducted by TDMHMR. Any gaps in the coverage periods of the individual plans of care result in loss of payment to the provider.

(c) (No change.)

(d) (No change.)

(e) (No change.)

§409.103. Payment Category Assignment and Provider Claims Payment.

(a) (No change.)

(b) (No change.)

(c) Reimbursement for HCS foster care, residential supports, and day habilitation is based upon the program participant's payment category assignment and the reimbursement rate for the specific service component provided.

(1) The payment category for a program participant is based upon a level-of-need (LON) assignment completed by TDMHMR or its designee as part of the level-of-care determination according to [25 TAC] §406.203 **of this title (relating to Eligibility and Review)**. LON assignments are derived from the service level score obtained from the administration of the Inventory for Client and Agency Planning (ICAP) to the program applicant/participant and from selected items on the Level-of-Care Assessment Form (TDHS Form 3650).

(A) An HCS Program applicant or participant is assigned one of the following five levels of need;

(i) An intermittent LON (LON 1) is assigned if the ICAP service level score equals 7, 8, or 9;

(ii) A limited LON (LON 5) is assigned if the ICAP service level score equals 4,5, or 6;

(iii) An extensive LON (LON **8**[6]) is assigned if the ICAP service level score equals 2 or 3;

(iv) A pervasive LON (LON **6** [8]) is assigned if the ICAP service level score equals 1.

(v) A "pervasive plus" LON (LON 9) is assigned when the TDHS Form 3650 documents an intervention code of 2 on at least one of Items 70-73.

(B) The LON assignment may be modified to take into account extraordinary service needs that **result** [results] from unusual behavioral challenges. The LON for these individuals combines ICAP service level scores and needs identified on selected items on the TDHS Form 3650. A LON that does not directly correspond to the ICAP service level score will be subject to utilization review by TDMHMR or its designee.

(i) Individuals who have very challenging behaviors that require a behavior intervention program that includes constant preventive actions by additional provider staff will be assigned the next higher LON from the original level. Additional staff may assist in the supervision of other individuals. Individuals originally assigned a pervasive LON will retain that assignment. Very challenging behaviors have the following characteristics:

(I) The behavior presents a danger to the individual or to others;

(II) The behavior warrants individualized objectives which include written intervention procedures;

(III) The frequency of the behavior is reduced only with constant staffing and a highly structured environment;

(IV) The behavior is difficult or impossible for a single staff person to control when it occurs;

(V) The behavior precludes some activities and an environment that cannot be structured. The interventions used to control the behavior require regular documentation, monitoring, and revisions as needed to meet the needs of the individual; and

(VI) TDHS Form 3650 indicates an intervention code of 1 on at least one of Items 70-73.

(ii) Individuals who have extremely challenging behaviors which pose a risk of harm to themselves or others and who require constant one-to-one staff supervision, 16 hours per day, will be assigned a pervasive plus LON. Extremely challenging behaviors have the following characteristics:

(I) The behavior may be life-threatening;

(II) The behavior warrants the highest priority of individualized objectives which include a written record of every occurrence of the behavior;

(III) The frequency of the behavior is difficult to reduce;

(IV) The consequences of the behavior are difficult to minimize; and

(V) TDHS Form 3650 indicates an intervention code of 2 on at least one of the Items 70-73.

(2) The provider completes the ICAP, enters the resulting service level score on the TDHS Form 3650, and completes the remainder of Form 3650. Information entered on the Form 3650 must represent the applicant's/participant's current status. Completed Form 3650 is submitted to **TDMHMR** [TDHS] for initial program enrollment or to TDMHMR for annual eligibility reevaluation.

(3) TDMHMR reviews LON assignments and, if made in accordance with criteria in this subsection, approves the LON assignment.

(A) If TDMHMR determines that information submitted for a LON was not correct or if information previously submitted has changed, the LON assignment is reevaluated and may be changed by TDMHMR. If the LON assignment is changed, reimbursement paid to providers will be adjusted back to the date of the original LON assignment in order to reflect the appropriate LON assignment.

(B) The provider in disagreement with an individual's changed LON assignment may request reconsideration by TDMHMR or its designee. Providers must submit **a written request** [written requests] for reconsideration of a changed LON assignment in accordance with §409.120 **of this title (relating to Utilization Review)** to TDMHMR or its designee within 10 calendar days of notification of a changed LON assignment.

(4) TDMHMR performs annual reevaluations of LON assignments in conjunction with annual reevaluations of ICF-MR LOC.

(A) If a higher LON assignment is requested at the time of the annual eligibility reevaluation, the provider must submit supporting documentation to TDMHMR describing the changes in the individual's needs in accordance with §409.120 **of this title** (relating to Utilization Review).

(B) A provider in disagreement with TDMHMR's denial to increase an individual's LON assignment may request reconsideration by TDMHMR. The provider must submit **a written request** [written requests] for reconsideration of the denial in accordance with §409.120 **of this title (relating to Utilization Review)** to TDMHMR or its designee within 10 calendar days of notification of the denial.

(5) Providers requesting a change to a higher LON at times other than the annual reevaluation must submit TDHS Form 3650 with supporting documentation describing the changes in the individual's needs to TDMHMR in accordance with §409.120 [of this title] (relating to Utilization Review). A provider in disagreement with TDMHMR's denial to increase an individual's LON assignment may request reconsideration by TDMHMR or its designee. The provider must submit **a** written **request** [requests] for reconsideration of the denial in accordance with **§409.120 of this title (relating to Utilization Review)** [§409.120(a)(3)] to TDMHMR within 10 calendar days of notification of the denial.

(d) (No change.)

(e) (No change.)

(f) (No change.)

(g) (No change.)

§409.109. Corrective Action and Provider Sanction.

The HCS provider must be in continuous compliance with the HCS Consumer Principles for Evidentiary Certification as described in Figure 1:25 TAC §409.109. Each HCS provider will receive a certification review at least annually in order to maintain certification status. The guidelines specified in §§409.110 - 409.115 of this title (relating to Hazards to Health, Safety, and Welfare; Level I Action; Level II Action; Level III Action; Unannounced or Intermittent Review Visits; and Discretionary Certification Sanctions) are used by **TDMHMR** [the Texas Department of Mental Health and Mental Retardation (TXMHMR) Home and Community-Based Services (HCS) program review teams and the TXMHMR HCS program coordination office] to determine the need for provider sanctions and/or provider onsite follow up review visits that occur before those required concurrently with the recertification review. Current certification review corrective action plans required from the provider and related timelines **remain in effect** [that are referenced in the Provider Survey and Certification Standards remain in effect, if applicable].

§409.114. Unannounced or Intermittent Review Visits.

(a) Determination.

(1) Unannounced or intermittent **reviews of the program provider** [review visits] may occur at any time, with or without prior notice to the provider, at the discretion of the **Quality Management HCS Program** [coordination office].

[(2) Unannounced or intermittent review visits must have the prior approval of the Texas Department of Mental Health Mental Retardation HCS director for provider services.] **(2)**[(3)] Before leaving an on-site certification visit, the HCS review team must ensure that no items of noncompliance remain that suggest:

(A) except for appealing, the HCS provider is unwilling to comply with the findings;

(B) there is likelihood that a hazard will occur at a later date, as the result of the remaining items of noncompliance; or

(C) pervasive patterns of noncompliance exist that indicate a hazard may occur before the next scheduled or indicated follow up visit, as a direct result of the remaining items of noncompliance.

(i) Pervasiveness is not a prime factor in determining whether a hazardous condition exists because noncompliance can be isolated or widespread.

(ii) Pervasiveness can indicate how difficult the noncompliance items can be for the HCS provider to correct and if an intermittent or unannounced review (on-site or desk review) is needed before the scheduled and/or indicated follow up visits.

(b) (No change.)

§409.115. Discretionary Certification Sanctions.

(a) (No change.)

[(b) Discretionary certification sanctions require consultation with, and prior approval of, the Home and Community-Based Services director for provider services.]

(b) [(c)] Discretionary certification sanctions may consist of any actions specified in §§409.109–409.114 of this title (relating to Corrective Action and Provider Sanction; Hazards to Health, Safety,

and Welfare; Level I Action; Level II Action; Level III Action; and Unannounced or Intermittent Review Visits).

§409.119. Gaps in Level-of-Care Coverage [After September 1, 1992].

(a) To request payment for days when services were delivered to **an individual** [a client] without a current LOC determination, the HCS **provider must** [program manager shall submit a letter to the TXMHMR HCS Program Coordination Office along with]:

[(1) a photocopy of the most recent LOC assessment form approved by either TDHS for the enrollment of the client or by TXMHMR for a continued stay review;] **(1)**[(2)] **electronically transmit to TDMHMR** a new LOC assessment form **, purpose code "E,"**[identical to the form mentioned in paragraph (1) of this subsection] for each period of time for which there was a lapsed LOC; [except for the following modifications:

[(A) purpose code "E" is marked for item 16;

[(B) the beginning and ending dates of the period for which no valid LOC existed are written in the comment section;

[(C) A physician's signature must be included, certifying that the person required an ICF/MR LOC during that time period.

[(D) The physician's initial's must be included in the comment section acknowledging the request for payment.]

(2) retain in the individual's record a LOC assessment form which:

(A) contains information identical to the form transmitted electronically to the department;

(B) indicates in the "Comments" section the beginning and ending dates of the time period for which no valid LOC existed; and

(C) is signed by a physician certifying that the individual required an ICF/MR LOC during that time period; and

(3) retain in the individual's record a completed verification statement, a copy of which is attached to this subchapter as Figure 2:25 TAC §409.119(a)(3), signed by the chief executive officer of the provider.

[(3) a completed verification statement, a copy of which is attached to this subchapter as Exhibit A, signed by the chief executive officer of the provider;

[(4) a purchase voucher (form 4116) to request payment for the period specified on the LOC form with purpose code "E" in item 16.]

(b) **The** [If the] request for payment **must be submitted as described in §409.105 of this title (relating to Rejected Claims).** [is for a period of lapsed LOC:

[(1) between September 1, 1992, and August 31, 1994, the request must be submitted by October 17, 1994; or

[(2) after September 1, 1994, the request must be submitted as described in §409.105 of this subchapter (relating to Rejected Claims.)

[(c) If the gap in LOC coverage extends over two fiscal years, a separate request must be submitted for the each time period in each fiscal year.] **(c)**[(d)] There must **have been an** [be a current] individual plan of care in **effect during** [place for] the period of time for which payment is sought. The individual plan of care cannot be retroactive. **(d)**[(e)] A request for payment will not be approved for periods of time that **an** [a] LOC has been denied by **TDMHMR or** TDHS. **(e)**[(f)] Purpose code "E" LOCs may not be used to establish initial HCS eligibility or to enroll **an individual** [a client] into HCS. **(f)**[(g)] **TDMHMR** [TXMHMR] shall notify the [program] provider **in writing that the request for payment is approved or denied** within 45 days of receipt of the request [in the form of an approved LOC or a letter of denial of payment]. The provider may appeal the denial of payment **in accordance with** [following] the procedure described in §409.106 of this **title** [subchapter] (relating to **Provider's** Right to **Administrative Hearing** [Appeal].)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on July 28, 1997.

TRD-9711106
Anne Utley
Chairman
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 206–4516

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Subchapter E. Home and Community-based Waiver Services-OBRA

25 TAC §§409.153, 409.154, 409.158, 409.167, 409.169, 409.170, 409.172, 409.173

The Texas Department of Mental Health and Mental Retardation (TDMHMR) proposes amendments to §§409.153, 409.154, 409.158, 409.167, 409.169, 409.170, 409.172, and 409.173, of Chapter 409, Subchapter E, concerning Home and Community-based Services - OBRA.

The proposed amendments would require the transfer of initial ICF-MR level-of-care eligibility determinations for HCS-O applicants from the Texas Department of Human Services to TDMHMR and update sections of the rule to reflect current practices for correcting lapsed level of care determinations to facilitate the timely processing of information; revise language to more clearly delineate conditions under which program applicants/participants may request fair hearings; incorporate the HCS-O Consumer Principles for Evidentiary Certification to provide the opportunity for public scrutiny and comment on standards affecting the rights of recipients and the procedures of providers; and update sections of the rule related to HCS program provider certification and TDMHMR contract administration to reflect current practice and to facilitate the timely processing of information.

Don Green, chief financial officer, has determined that for each year of the first five-year period the proposed amendments are in effect there will be fiscal implications of less than $267 per year for a total of $1,333, with a corresponding reduction to the Texas Department of Human Services. There are no additional costs to local government or businesses.

Ernest McKenney, director, Medicaid Administration, has determined that for each year of the first five years the amendments are in effect the public benefit anticipated will be a more streamlined HCS-O eligibility determination process and improved enforceability of program provider certification requirements. There is no anticipated economic cost to persons who are required to comply with the proposed sections. There will be no effect on small business.

A public hearing will be held at 8:30 a.m. on September 18, 1997, in the auditorium of the main TDMHMR Central Office building (Building 2) at TDMHMR Central Office, 909 West 45th Street, Austin, Texas, to accept oral and written testimony concerning the proposal. Persons requiring an interpreter for the deaf and hearing impaired should notify Sheila Wilkins, Office of Policy Development, at least 72 hours prior to the hearing by calling (512) 206-4516.

Questions about the content of the proposal may be directed to Mr. McKenney. Comments on the proposed amended sections should be submitted to Linda Logan, director, Policy Development, Texas Department Mental Health and Mental Retardation, P.O. Box 12668, Austin, TX 78711-2668, within 30 days of publication.

The amended sections are proposed under the Health and Safety Code, §532.015(a), which provides the TDMHMR with broad rulemaking authority; and Human Resource Code, Chapter 32, §32.021, and Government Code, Chapter 531, §531.021, which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer federal medical assistance funds and administer the state's medical assistance program.

The section affects Human Resources Code, Chapter 32, and Government Code, Chapter 531, §531.021. DIVISION HEADINGS AND GENERAL RULES APPLICATION

§409.153. [Client] Eligibility Criteria.

(a) To be determined eligible by the Texas Department of Mental Health and Mental Retardation **(TDMHMR)** [(TXMHMR)[for the OBRA Targeted Waiver Program, an applicant must:

(1) be determined by **TDMHMR** [the Texas Department of Mental Health and Mental Retardation (TXMHMR)] to have mental retardation and/or a related condition, need active treatment, and have been previously or be currently inappropriately placed in a Medicaid certified nursing facility based on **a** [an annual] resident review in accordance with the requirements of OBRA-87;

(2) meet the level of care criteria for intermediate care facilities for the mentally retarded (ICF-MR) as determined by the **department in accordance with Chapter 406, Subchapter E of this title (concerning ICF/MR Program: Eligibility and Review)** [Texas Department of Health in accordance with Title 40, TAC, §§27.103-27.109] and with [as specified in] §409.154 of this title (relating to Level of Care Criteria.);

(3) choose home and community-based waiver services as an alternative to ICF-MR placement based on an informed choice;

(4) have an individual plan of care for waiver services as specified in §409.155 of this title (relating to Individual Plan of Care for Waiver Services) which does not exceed 125% of the estimated average annualized expenditure for **ICF/MR** [waiver] services approved by Health Care Financing Administration (HCFA) in the formula calculations;

(5) meet the financial eligibility criteria for waiver services as specified in §409.156 of this title (relating to Financial Eligibility Criteria);

(6) be directly discharged from a Medicaid certified nursing facility; and

(7) receive waiver services.

(b) Enrollment in this waiver program is limited to the number of **participants** [clients] approved by HCFA [and allocated to the provider].

(c) **Individuals** [Clients] may be enrolled in only one waiver program at a time.

§409.154. Level of Care Criteria.

(a) **Individuals** [Waiver clients] must meet the level of care **(LOC)** criteria for Intermediate Care Facilities for the Mentally Retarded (ICF-MR I, V, VI, or VIII) as determined by the **TDMHMR or the** Texas Department of Human Services (TDHS) according to applicable state and federal regulations, and as verified by a current **LOC** [level of care] assessment form.

(b) **An LOC** [preadmission level of care] assessment **(or reassessment) form signed** [performed] by **the department or** TDHS **is considered valid for enrollment purposes by the department for 364 days from the date of issuance** [expires 90 days from its issuance].

(c) **LOC** [Level of care] assessments must be performed annually for all **individuals** [waiver clients].

(d) In order for payment to be considered for days [since September 1, 1992,] that **an individual** [a client] was receiving **OBRA Targeted Waiver Program** [(HCS-O)] services but did not have a current LOC assessment form in place, the provider must: [submit a letter to the TXMHMR HCS Program Coordination Office along with]:

[(1) a photocopy of the most recent LOC assessment form approved by either TDHS for the enrollment of the client or by TXMHMR for a continued stay review;] **(1)**[(2)] **electronically transmit to the department** a new LOC assessment form **, purpose code "E,"** [identical to the form mentioned in paragraph (1) of this subsection] for each period of time for which there was a lapsed LOC **;**[except for the following modifications:]

[(A) purpose code "E" is marked for item 16;

[(B) the beginning and ending dates of the period for which no valid LOC existed are written in the comment section;

[(C) A physician's signature must be included, certifying that the person required an ICF/MR LOC during that time period.

[(D) The physician's initial's must be included in the comment section acknowledging the request for payment.]

(2) retain in the individual's record a LOC assessment form which:

(A) contains information identical to the form transmitted electronically to the department;

(B) indicates in the "Comments" section the beginning and ending dates of the time period for which no valid LOC existed; and

(C) is signed by a physician certifying that the individual required an ICF/MR LOC during that time period; and

(3) retain in the individual's record a completed verification statement, a copy of which is attached to this subchapter as Figure 1:25 TAC §409.154, signed by the chief executive officer of the provider.

[(3) a completed verification statement, a copy of which is attached to this subchapter as Exhibit A, signed by the chief executive officer of the provider;

[(4) a purchase voucher (form 4116) to request payment for the period specified on the LOC form with purpose code "E" in item 16.]

(e) **A request for payment for a period of lapsed LOC must be submitted as described in §409.161 of this title (relating to Rejected Claims.)** [If the request for payment is for a period of lapsed LOC:

[(1) between September 1, 1992, and August 31, 1994, the request must be submitted by October 17, 1994; or

[(2) after September 1, 1994, the request must be submitted as described in §409.105 of this subchapter (relating to Rejected Claims.)

[(f) If the gap in LOC coverage extends over two fiscal years, a separate request must be submitted for each time period in each fiscal year.]

(f) [(g)] There must be a current individual plan of care in place for the period of time for which payment is sought. The individual plan of care cannot be retroactive.

(g) [(h)] A request for payment will not be approved for periods of time that a LOC has been denied by **TDMHMR or** TDHS.

(h) [(i)] Purpose code "E" LOCs may not be used to establish initial HCS-O eligibility or to enroll **an individual** [a client] into HCS-O.

(i) [(j)] **TDMHMR**[TXMHMR] shall notify the [program] provider **in writing that the request for payment is approved or denied** within 45 days of receipt of the request [in the form of an approved LOC or a letter of denial of payment]. The provider may appeal the denial of payment **in accordance with** [following] the procedure described in §409.162 of this **title** [subchapter] (relating to **Provider's** Right to Appeal.)

§409.158. [Client's] Right To Appeal.

Any individual whose request for eligibility for the HCS-O Program is denied or is not acted upon with reasonable promptness, or whose HCS-O Program services have been terminated, suspended, or reduced by the department is entitled to a fair hearing, conducted by the Texas Department of Human Services, in accordance with 40 TAC §79.1101 et seq., except that a request for a fair hearing must be submitted to the TDMHMR Office of Medicaid Administration and received within 90 days from the date of the notice of denial of eligibility for the HCS-O Program or notice of termination, suspension, or reduction of HCS-O Program services. [Any applicant or client who is denied waiver program services is entitled to a fair hearing conducted by the Texas Department of Human Service according to TDHS's hearing rules included in Title 40, TAC, Chapter 79. Requests for hearings should be submitted to TXMHMR.]

§409.167. Corrective Action and Provider Sanction.

The HCS-O provider must be in continuous compliance with the HCS-O Consumer Principles for Evidentiary Certification as described in Figure 2:25 TAC §409.167. Each HCS-O provider will receive a certification review at least annually in order to maintain certification status. The guidelines specified in §§409.168-409.173 of this title (relating to Hazards to Health, Safety and Welfare; Level I Action; Level II Action; Level III Action; Unannounced or Intermittent Review Visits; and Discretionary Certification Sanctions) are used by **TDMHMR** [the Texas Department of Mental Health and Mental Retardation (TXMHMR) Home and Community-Based Services-OBRA (HCS-O) program review teams and the TXMHMR HCS program coordination office] to determine the need for provider sanctions and/or provider on-site follow-up review visits that occur before those required concurrently with the recertification review. Current certification review corrective action plans required from the provider and related timelines that are referenced in the HCS-O Program Provider Manual remain in effect, if applicable.

§409.169. Level I Action.

(a) (No change)

(b) No change.

(c) Vendor Hold. If the provider does not correct all remaining items of noncompliance during the first follow-up visit, vendor hold is implemented. The vendor hold is effective for up to 60 calendar days.

(1) The **Quality Management HCS Program Office** [Home and Community-based Services (HCS) coordination office] recommends to the **TDMHMR Office of Medicaid Administration** [Texas Department of Human Services (TDHS)] that provider reimbursement be suspended until corrective actions are completed.

(2) **TDMHMR** [TXMHMR] completes a second follow-up review visit between 30 and 45 calendar days from the date the vendor hold was implemented.

(3) If the provider corrects all items of noncompliance during the second follow-up visit, the vendor hold is removed effective the date of the exit conference of the visit.

(d) (No change.)

§409.170. Level II Action.

(a) (No change.)

(b) (No change.)

(c) (No change.)

(d) Vendor Hold. If the provider does not correct all remaining items of noncompliance during the second follow-up visit, vendor hold is implemented. The vendor hold is effective for up to 60 calendar days.

(1) The **Quality Management HCS Program Office** [Home and Community-based Services (HCS) coordination office office] recommends to the **TDMHMR Office of Medicaid Adminis-**

tration [Texas Department of Human Services (TDHS)] that provider reimbursement be suspended until corrective actions are completed.

(2) **TDMHMR** [TXMHMR] completes a third follow-up review visit between 30 and 45 calendar days from the date the vendor hold was implemented.

(3) If the provider corrects all items of noncompliance during the third follow-up visit, the vendor hold is removed effective the date of the exit conference of the visit. **(e)**[(d)] Denial of Certification. Denial of certification results if the provider does not fully correct all items of noncompliance within 60 calendar days of the establishment of vendor hold, as determined by the third follow-up visit by **TDMHMR** [TXMHMR]. The **Quality Management HCS Program Office** [HCS program coordination office] does not certify the provider and recommends to the **TDMHMR Office of Medicaid Administration** [appropriate state authority] that contract cancellation action be initiated.

§409.172. Unannounced or Intermittent Review Visits.

(a) Determination.

(1) Unannounced or intermittent **reviews of the provider** [review visits] may occur at any time, with or without prior notice to the provider, at the discretion of the **Quality Management HCS Program Office** [Home and Community-Based Services (HCS) Program Coordination office.

[(2) Unannounced or intermittent review visits must have the prior approval of the Texas Department of Mental Health and Mental Retardation HCS director for provider services.]

(2) [(3)] Before leaving an on-site certification visit, the HCS-O review team must ensure that no items of noncompliance remain that suggest:

(A) except for appealing, the HCS-O provider is unwilling to comply with the findings;

(B) there is a likelihood that a hazard will occur at a later date, as the result of the remaining items of noncompliance; or

(C) pervasive patterns of noncompliance exist that indicate a hazard may occur before the next scheduled or indicated follow-up visit, as a direct result of the remaining items of noncompliance.

(i) Pervasiveness is not a prime factor in determining whether a hazardous condition exists because noncompliance can be isolated or widespread.

(ii) Pervasiveness can indicate how difficult the noncompliance items can be for the HCS-O provider to correct and if an intermittent or unannounced review (on-site or desk review) is needed before the scheduled and/or indicated follow-up visits.

(b) (No change.)

§409.173. Discretionary Certification Sanctions.

(a) (No change.)

[(b) Discretionary certification sanctions require consultation with, and prior approval of, the Home and Community-Based Services director for provider services.]

(b) [(c)] Discretionary certification sanctions may consist of any actions specified in §§409.167 - 409.172 of this title (relating to Corrective Action and Provider Sanction; Hazards to Health, Safety and Welfare; Level I Action; Level II Action; Level III Action; and Unannounced or Intermittent Review Visits).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on July 28, 1997.

TRD-9711107
Ann Utley
Chairman
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 206–4516

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 5. Property and Casualty Insurance

Subchapter R. Temporary Rate Reduction for Certain Lines of Insurance

28 TAC §§5.14002–5.14005, 5.14007 and 5.14011

The Texas Department of Insurance proposes amendments to §§5.14002 - 5.14005, 5.14007 and 5.14011, concerning temporary rate reductions for certain lines of insurance. The amendments are necessary to update Subchapter R (Temporary Rate Reduction for Certain Lines of Insurance) to apply to 1998 rates. Subchapter R was enacted to implement Article 5.131 of the Texas Insurance Code. Sections 5.14000 - 5.14011 concern the temporary rate reductions for certain lines of insurance which are required by Article 5.131. The sections set forth the calculation and application of the amount of the rate reduction for certain lines of insurance for insurers to pass through to policyholders, on a prospective basis, the reduction in loss and allocated loss adjustment expense anticipated from recent tort reform legislation. The department proposes to the commissioner that §§5.14000 - 5.14011 continue in effect with changes only to the amount of loss and ALAE reduction percentages applicable to specified lines of insurance (§5.14004), instructions for the calculation and application of rate reduction factors as applied to policies effective in 1998 (§5.14005), filing requirements (§5.14007), references to the changed subsection numbers (§§5.14002, 5.14003) and the effective date of the new reduction percentages (§5.14011). As instructed by the legislature, the commissioner will make a final determination whether §§5.14000 - 5.14011, and particularly the rate reduction factors set forth in §5.14004, should be amended based on evidence adduced at a public hearing held for this purpose on August 26, 1997, and on public comment to this proposal. Oral testimony and written comments and evidence submitted at the August 26 hearing will be considered as part of the record pertaining to these proposed amendments to §§5.14002 - 5.14011. There is no need to resubmit comments and data submitted for the August 26 hearing, however, all parties are invited to submit additional comments during the formal comment period.

C. H. Mah, associate commissioner for the Technical Analysis Division, has calculated the fiscal impact for the first five years that the amended rule will be in effect. Mr. Mah has determined that any impact will occur in the first three years because Article 5.131 provides that the rates reduction percentages established by the commissioner remain effective only until January 1, 2001. Mr. Mah has determined that for each year of the remaining three years that the proposed rate reductions are in effect, any fiscal implications to state government are the result of the legislative enactment of Article 5.131 of the Insurance Code, and are not as a result of the adoption and implementation of these sections. Mr. Mah has also determined that for each year of the remaining three years the proposed rate reductions will be in effect, there will be no fiscal implications to local government nor to small business as a result of enforcing or administering the sections. There will be no detrimental effect on local employment or the local economy as a result of the proposal.

Mr. Mah has also calculated the public benefit and cost anticipated for the first five years that the amended rule is in effect. Any such effect will be felt only for the first three years that the rule is in effect because Article 5.131 provides that the rates reduction percentages established by the commissioner remain effective only until January 1, 2001. Mr. Mah has determined that the public benefit as a result of the sections will be the reduction in rates charged by insurers for certain lines of insurance affected by tort reform legislation. Consumers will experience savings in insurance premiums as a result of implementation of the proposal. The amount of premium savings to the consumer will vary depending on the type of coverage the person has, the amount of the deductible, the type of company the person is insured by and similar factors. The estimated cost of compliance to insurers that write the lines of insurance affected by these sections will vary depending on various factors including size of company, type of company, whether the company is a regulated or non rate regulated insurer, the type of risk written by the insurer, the volume of premium dollars the insurer writes for the lines of insurance affected, and the type of data collection the insurer maintains. The largest cost of compliance will have occurred in 1995 and 1996 when insurers reprogrammed their systems to account for the rate reduction factor. The proposed amendments are not expected to result in substantial additional costs. Costs of compliance for the remaining three years are expected to range from $1,000 - $100,000 per company, consisting primarily of computer costs and filing of tort reform forms. The assumptions on which these costs are based may change substantially as the department receives data during the comment period.

Comments on the proposal must be submitted within 30 days after publication of the proposed section in the Texas Register, to Caroline Scott, Chief Clerk, Texas Department of Insurance, P. O. Box 149104, Mail Code 113-2A, Austin, Texas 78714-9104. An additional copy of the comment must be submitted to Ann Bright, Legal & Compliance Division, Texas Department of Insurance, P. O. Box 149104, MC 110-1A, Austin, Texas 78714-9104. The text of current §§5.14000, 5.14001, 5.14006 and 5.14008-5.14010 will not be republished in the Texas Register as part of this proposed rule because the department proposes no changes to those sections. Interested parties may view the current Subchapter R via the Internet at http://www.sos.state.tx.us/tac/28/I/5/R/index.html, or obtain a copy from the Office of the Chief Clerk, Texas Department of Insurance.

These amendments are proposed under the Insurance Code, Articles 5.131 and 1.03A and Government Code, Article 2001.004. Article 5.131 enacted by the 74th Legislature requires the commissioner to issue rules mandating appropriate rate reductions for certain lines of insurance to pass through, on a prospective basis, the savings that accrue from tort reform legislation enacted in the regular sessions of the 73rd and 74th legislatures, and to hold a hearing on such rules on or before September 1 of each of the years that the rates are to remain in effect. Article 5.131 also provides for the granting of administrative relief and the collection of data to monitor compliance with the statute. Article 1.03A authorizes the commissioner of insurance to promulgate and adopt rules and regulations for the conduct and execution of the duties and functions of the department. Government Code §§2001.004 et seq. authorizes and requires each state agency to adopt rules of practice setting forth the nature and requirement of available procedures and prescribes the procedures for adoption of rules by a state administrative agency.

The following article is affected by this proposal: Insurance Code, Article 5.131

§5.14002. Application to Insurers and Monitoring of Insurers.

(a) This subchapter applies to any insurer that is authorized to do business in this state and that is authorized to write any of the liability lines or sublines set forth in §5.14004 of this title (relating to Loss and ALAE Reduction Percentages by Line), including capital stock companies, mutual insurance companies, Lloyd's plan insurance companies, and reciprocal or interinsurance exchanges.

(b) This subchapter, except for §§5.14003, 5.14004, 5.14005, 5.14006, and 5.14008 of this title (relating to Rulemaking Procedures for Reductions in Rates, Loss and ALAE Reduction Percentages by Line, Calculation and Application of Rate Reduction Factor, Duration, and Administrative Relief), also applies, to the limited extent of passing through savings on a prospective basis and monitoring of compliance with the legislative directive, to county mutuals, joint underwriting associations, and other insurers, whether rate regulated or not, for those lines which are not rate regulated.

(c) All insurers shall pass through the savings from the tort reform legislation to their policyholders on a prospective basis for the lines or sublines of insurance identified in **§5.14004(c)** [§5.14004(c)(1)-(13)] of this title (relating to Loss and ALAE Reduction Percentages by Line).

(d) All insurers that write any of the types of coverages or lines and sublines identified in **§5.14004(c)** [§5.14004(c)(1)-(13)] of this title (relating to Loss and ALAE Reduction Percentages by Line), shall provide information to the department in the form of rate filings, special data calls, informational hearings, and any other means consistent with other provisions of the Insurance Code and determined by the commissioner to be necessary to monitor compliance with the provisions of Article 5.131, Insurance Code, and this subchapter.

§5.14003. Rulemaking Procedures for Reductions in Rates.

(a) On or before September 1 of each year, the commissioner shall hold a rulemaking hearing to determine the loss and ALAE reduction percentages for each line or subline of insurance identified

in **§5.14004(c)** [§5.14004(c)(1)-(13)] of this title (relating to Loss and ALAE Reduction Percentages by Line).

(b) The commissioner shall amend or adopt rules, as necessary, mandating the use of the loss and ALAE reduction percentage for the lines and sublines identified in **§5.14004(c)** [§5.14004(c)(1)-(13)] of this title (relating to Loss and ALAE Reduction Percentages by Line).

(c) The loss and ALAE reduction percentages or the adjusted benchmark rate adopted or determined by the commissioner under this subchapter shall be included in the rate charged for each policy or coverage with an effective date on and after January 1, 1996, and to each policy or coverage effective on and after the 90th day after the date of each subsequent commissioner's order adopting the loss and ALAE reduction percentages or determination of the adjusted benchmark rate under this subchapter.

§5.14004. Loss and ALAE Reduction Percentages by Line.

(a) The rate or charge for each policy containing any of the following coverages with an effective date on and after January 1, 1996, shall, insofar as the subject liability coverage is concerned, be reduced by the application of rate reduction factors calculated as provided in §5.14005 (relating to Calculation and Application of Rate Reduction Factor) using the loss and ALAE reduction percentages in subsection (c) of this section.

(b) A single loss and ALAE reduction percentage is used for coverages written on an occurrence policy basis. Three loss and ALAE reduction percentages are used for coverages written on a claims made policy basis effective on or after January 1, 1996 but before January 1, 1997 **. Two loss and ALAE reductions percentages (claims made policy percentages (1) and (3)) are used for coverages written on a claims made policy basis effective on or after January 1, 1998.**[:]

(1) claims made policy percentage 1 is the loss and ALAE reduction percentage that reflects the reduction due to all of the tort reform legislation;

(2) claims made policy percentage 2 is the loss and ALAE reduction percentage that reflects only those reductions due to the tort reform legislation applying to claims filed and suits commenced on or after September 1, 1995 and which arise from actions accruing before that date;

(3) claims made policy percentage 3 is the loss and ALAE reduction percentage that reflects only the reductions due to the tort reform legislation applying to claims filed and suits commenced on or after September 1, 1996 and which arise from actions accruing before September 1, 1995.

(c) The **first** loss and ALAE reduction percentages **shown for each line is applicable to policies effective on or after January 1, 1996 but before January 5, 1998; the second reduction percentage is applicable to policies effective on or after January 5, 1998** [are]:

(1) private passenger automobile liability insurance for bodily injury– 7.5%/ **9.0%**

(2) commercial automobile liability insurance for bodily injury: 12.0%/ **13.5%**

(3) the liability portion

(A) of homeowner's insurance—0%/ **0%**

(B) of farm and ranch owner's insurance (for policies effective prior to January 1, 1998)—10.0%/ **9.0%**

(C) of renter's insurance–0%/ **0%**

(4) professional liability insurance as defined in the Insurance Code, article 5.15-1 for:

(A) physician, other health care provider

(i) claims made policy percentage 1–11.5%/ **15.0%**

(ii) claims made policy percentage 2–3.5% / **NA**

(iii) claims made policy percentage 3– 8.5%/ **12.8%**

(iv) occurrence policy–11.5%/ **15.0%**

(B) hospital

(i) claims made policy percentage 1–15.0%/ **17.0%**

(ii) claims made policy percentage 2–3.5%/ **NA**

(iii) claims made policy percentage 3–8.5%/ **10.5%**

(iv) occurrence policy–15.0%/ **17.0%**

(5) commercial liability insurance for damages arising out of the manufacture, design, importation, distribution, packaging, labeling, lease, or sale of a product or for completed operations coverage (products/completed operations)–12.5%/ **18.0%**

(6) personal umbrella and excess liability insurance–7.5%/ **10.0%**

(7) the liability portion of commercial multi-peril insurance

(A) with a divisible premium, refer to §5.14005(d) of this title (relating to Calculation and Application of Rate Reduction Factor)

(B) with an indivisible premium, including business owner's policies–12.5%/ **17.0%**

(8) the employer's liability portion of workers' compensation insurance–0%/ **0%**

(9) commercial general liability, which includes premises medical, fire, legal liability, personal advertising injury, contractual liability, and liability for all premises–12.5%/ **17.0%**

(10) commercial umbrella–18.0%/ **30%**

(11) commercial excess liability

(A) general liability/commercial multiple peril–18.0%/ **32%**

(B) commercial automobile–18.0%/ **25%**

(C) products liability–18.0%/ **20%**

(D) medical professional - physicians, other health care provider (i.) claims made policy percentage 1– 15.0%/ **17.5%**

(ii) claims made policy percentage 2–4.5%/ **NA**

(iii) claims made policy percentage 3–11.5%/ **15.9%**

(iv) occurrence policy–15.0%/ **17.5%**

(E) medical professional - hospitals -

(i) claims made policy percentage 1– 20.0%/ **27.5%**

(ii) claims made policy percentage 2–4.5%/ **NA**

(iii) claims made policy percentage 3–11.5%/ **12.5%**

(iv) occurrence policy–20.0%/ **27.5%**

(F) other professional

(i) claims made policy percentage 1– 17.5%/ **25.0%**

(ii) claims made policy percentage 2– 0.5%/ **NA**

(iii) claims made policy percentage 3–17.0%/ **9.0%**

(iv) occurrence policy–17.5%/ **25.0%**

(12) professional liability other than insurance described by paragraph (4) of this section

(A) claims made policy percentage 1–12.0%/ **20%**

(B) claims made policy percentage 2–1.0%/ **NA**

(C) claims made policy percentage 3–11.0%/ **15.4%**

(D) occurrence policy–12.0%/ **20.0%**

(13) other commercial liability insurance, if not already covered as a part of coverage in paragraph (9) of this section, when written as a monoline coverage or added to another policy, including the following lines and sublines:

(A) fire legal liability–12.5%/ **17.0%**

(B) contractual liability–12.5%/ **17.0%**

(C) pollution liability

(i) claims made policy percentage 1– 6.0%/ **12.5%**

(ii) claims made policy percentage 2–1.0%/ **NA**

(iii) claims made policy percentage 3–5.5%/ **7.2%**

(iv) occurrence policy–6.0%/ **12.5%**

(D) owners and contractors protective liability–12.5%/ **17.0%**

(E) railroad protective liability–12.5%/ **17.0%**

(F) liquor liability

(i) claims made policy percentage 1–12.5%/ **17.0%**

(ii) claims made policy percentage 2– 2.0%/ **NA**

(iii) claims made policy percentage 3–8.0%/ **11.0%**

(iv) occurrence policy–12.5%/ **17.0%**

(G) farm liability–12.5%/ **17.0%**

(H) garage liability— 6.0%/ **17.0%**

(I) all other commercial liability lines and sublines–12.5%/ **17.0%**

(14) the liability portion of farm and ranch owner's insurance (for policies effective after January 1, 1998): 10% / 9%

§5.14005. Calculation and Application of Rate Reduction Factor.

(a) For those lines or sublines of insurance that have a benchmark rate, a rate reduction factor will be calculated by the department using the loss and ALAE reduction percentages set forth in **§5.14004(c)** [§5.14004(c)(1)-(13)] of this title (relating to Loss and ALAE Reduction Percentages by Line) and relevant industry average expenses for the applicable line or subline. This rate reduction factor shall be applied to the applicable benchmark rate to arrive at an adjusted benchmark rate for purposes of this section.

(1) For rates for policies or coverage with an effective date on and after January 1, 1996, the insurer shall apply its flex percent on file with the department to the adjusted benchmark rate.

(2) For subsequent filings, the insurer shall apply its flex percent developed without consideration of tort reform to the adjusted benchmark rate then in effect.

(b) For those lines and sublines other than those subject to the Insurance Code, article 5.101, the loss and ALAE reduction percentage shall be used by each insurer to calculate the rate reduction factor to be applied to occurrence policy rates in effect on January 1, 1996 for the lines or sublines identified in **§5.14004(c)** [§5.14004(c)(1)-(13)] of this title (relating to Loss and ALAE Reduction Percentages by Line) according to the following method:

(1) The insurer shall apply the loss and ALAE reduction percentage to the loss and allocated loss adjustment expense (ALAE) portion of the rate.

(2) The insurer shall add the provision for other company fixed expenses, including unallocated loss adjustment expenses (ULAE), to the loss and ALAE portion of the rate as adjusted in paragraph (1) of this subsection.

(3) The insurer shall add the provision for other company fixed expenses, including ULAE, to the loss and ALAE portion of the rate before the adjustment for the loss and ALAE reduction percentage in paragraph (1) of this subsection.

(4) The rate reduction factor is equal to the ratio of the value calculated in paragraph (2) of this subsection to the value calculated in paragraph (3) of this subsection.

(5) The insurer shall apply the rate reduction factor directly to the rate.

(c) For those lines and sublines other than those subject to the Insurance Code, article 5.101, the claims made policy loss and ALAE reduction percentages shall be used by each insurer to calculate the rate reduction factor to be applied to claims made policy rates in effect on January 1, 1996 for the lines or sublines identified in **§5.14004(c)** [§5.14004(c)(1)-(13)] of this title (relating to Loss and ALAE Reduction Percentages by Line) according to the following method:

(1) The insurer shall determine in accordance with the instructions in **the version of** Form **TR-3A-R** [TR-3A], Calculation of Tort Reform Impact, Claims Made Policies, and Form **TR-3B-R** [TR-3B-R], Calculation of Rating Values, Claims Made Policies **applicable to the policy year:**

(A) that part of the loss and ALAE portion of the rate to which claims made policy percentage 1 applies;

(B) that part, if any, of the loss and ALAE portion of the rate to which claims made policy percentage 2 applies; and

(C) that part, if any, of the loss and ALAE portion of the rate to which claims made policy percentage 3 applies.

(2) The insurer shall apply the appropriate claims made policy loss and ALAE reduction percentage to each of the three parts of the loss and ALAE portion of the rate determined in paragraph (1) of this subsection, add the calculated reductions and subtract this sum from the total loss and ALAE portion of the rate.

(3) The insurer shall add the provision for other company fixed expenses, including ULAE, to the loss and ALAE portion of the rate as adjusted in paragraph (2) of this subsection.

(4) The insurer shall add the provision for other company fixed expenses, including ULAE, to the loss and ALAE portion of the rate before the adjustment for the claims made policy loss and ALAE reduction percentages in paragraph (2) of this subsection.

(5) The rate reduction factor is equal to the ratio of the value calculated in paragraph (3) of this subsection to the value calculated in paragraph (4) of this subsection.

(6) The insurer shall apply the rate reduction factor directly to the rate. **(7)** The department adopts and incorporates herein by reference, Form **TR-3A-R** [TR3A] Calculation of Tort Reform Impact, Claims Made Policies, and Form **TR-3B-R** [TR-3B], Calculation of Rating Values, Claims Made Policies. **The department publishes a version of Forms TR-3A-R and TR-3B-R for policies effective in each of the years 1996, 1997 and 1998.** These forms [are published by the Texas Department of Insurance and] may be obtained from the Technical Analysis Division, Mail Code 105-5G, Texas Department of Insurance, 333 Guadalupe, P. O. Box 149104, Austin, Texas 78714-9104.

(d) For package coverages, such as commercial multi-peril, where premiums are based on the premiums for each of its component monoline coverages, the rate reduction factor, if any, appropriate to each of the various component monoline coverages shall be applied by the insurer.

(e) For insurers writing any commercial liability or professional liability lines or large risk, the rate reduction factor for the specific line identified in §5.14004 of this subchapter (relating to Loss and ALAE Reduction Percentages by Line) may be reduced by the individual tort reform component specified in Form TR95 **or TR97,** Pricing Components by Tort Reform, if coverage for the specific tort reform identified in Form TR95 **or TR97** is specifically excluded from the policies. Insurers shall be required to file a certification form, developed by the department, that indicates the rate reduction factor used, the specific individual tort reform components used to reduce the factor, the premium volume affected, and such other information determined by the department. The department adopts and incorporates herein by reference **Forms** Form TR95 **and TR97,** Pricing Components by Tort Reform. **These forms are** [This form is] published by the Texas Department of Insurance and may be obtained from the Technical Analysis Division, Mail Code 105-5G, Texas Department of Insurance, 333 Guadalupe, P. O. Box 149104, Austin, Texas 78714-9104.

(f) Insurers shall apply the appropriate rate reduction factor to the rates used to determine minimum premiums, maximum premiums and other rating values under retrospective rating plans.

(g) For umbrella or excess policies that are rated as a percentage of the underlying primary policy rates, the insurer may adjust the umbrella or excess policy rate reduction factor to eliminate any duplication in the loss and ALAE reduction percentages as follows:

(1) Determine the rate reduction factor appropriate to the umbrella or excess policy as specified in subsections (a) or (b) of this section.

(2) Determine the rate reduction factors appropriate to each of the insurer's underlying primary policies as specified in subsections (a) or (b) of this section.

(3) Compute a weighted average rate reduction factor for the underlying primary policies using the insurer's statewide average distribution of premiums for the underlying policies at limits corresponding to the retention under the umbrella or excess policy.

(4) The adjusted umbrella or excess policy rate reduction factor is equal to the ratio of the value calculated in paragraph (1) of this subsection to the value calculated in paragraph (3) of this subsection.

(5) In no event shall the ratio calculated in paragraph (4) of this subsection exceed one (1.000).

(6) The insurer shall apply the adjusted rate reduction factor directly to the percentage used to calculate its umbrella or excess policy premiums. .

§5.14007. Filing Requirements

(a) Each insurer which is required to apply the rate reduction factor shall file a certification form, developed by the department, for each line or combination of lines subect to this subchapter, executed by an officer or director of the insurer which indicates what the rate of the insurer would have been without application of the rate reduction factor for tort reform legislation and what the rate is with application of the rate reduction factor.

(1) an initial certification form shall be filed with the department, no later than December 1, 1995, for the insurer's rates that are to be effective January 1, 1996.

(2) For any rate filing made by an insurer subject to this subchapter, with an effective date on and after January 1, 1996, the insurer shall file the rate filing in accordance with applicable rules currently in effect at the time of the filing regarding justification for the filed rates and the certification form. etb>(3) **Any insurer who will not make a rate filing with an effective date on or after January 5, 1998, must submit a certification form, developed by the department, no later than December 5, 1997.**

(b) Each non-rate regulated insurer and those insurers writing non-rate regulated lines shall file a certification form, developed by the department, for each line or combination of lines subject to this subchapter, executed by an officer or director of the insurer which indicates what the rate of the insurer would have been without application of the prospective savings for tort reform legislation and what the rate is with application of the prospective savings for tort reform legislation. The certification form will include information on the premium volume of the insurance and explanation of the overall rate reduction applied by the insurer.

*§5.14011. [Continuation of] Loss and ALAE Reduction Percentages **Applicable in Specified Years.***

The loss and ALAE reduction percentages by line as set forth in §5.14004 of this title (relating to Loss and ALAE Reduction

Percentages by Line) shall remain in effect until **January 1, 2001, or until** [shall be applied to the rate or charge for each policy effective on and after January 1, 1996, and] further order of the commissioner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711333
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–6327

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Chapter 12. Independent Review Organizations

The Texas Department of Insurance proposes new Chapter 12, concerning independent review organizations. This chapter implements Senate Bill 386, enacted by Acts, 75th Legislature, 1997, and codified at Texas Insurance Code Article 21.58C, effective September 1, 1997. This new article of the Insurance Code, Article 21.58C, establishes the requirement that patients who have received an adverse determination of medical necessity for requested medical treatment or services from a payor and have unsuccessfully appealed such determination may request, through the utilization review agent making the adverse determination, an independent review of their case by an independent review organization. The statute requires that the independent review organization and the person conducting the independent review have no relationship of any kind with the payor, the utilization review agent, the provider(s) of record, or anyone involved in the initial adverse determination or its appeal. Through this proposed chapter, the department is setting out standards and rules for the certification, selection, and operation of independent review organizations in this state. This chapter will enable independent review organizations to operate in the state as envisioned by the statute and provide the independent review required in adverse determinations.

Proposed Subchapter A contains general provisions regarding this chapter. Proposed §12.1 sets forth the statutory basis for this chapter. Proposed §12.2 provides for severability of terms or sections of this chapter under certain circumstances. Proposed §12.3 describes the effect of the rules promulgated by this chapter. Proposed §12.4 sets forth the applicability of this chapter. Proposed §12.5 defines certain terms used in this chapter.

Proposed Subchapter B contains information regarding the certification of independent review organizations. Proposed §§12.101 and 12.102 state where to file an application for certification of an independent review organization and how to obtain forms for such application, respectively. A list of information required to be submitted by the applicant to the commissioner is set forth in proposed §12.103. Proposed §12.104 sets forth applicable time frames and the duties of the applicant and the department during the application process. Requirements for filing revisions to the application during the review process are set forth in proposed §12.105. Proposed §12.106 provides that the department may conduct on-site qualifying examinations as a requirement of certification. Proposed §12.107 describes how to withdraw an application from consideration. Proposed §12.108 provides that an independent review organization must apply for renewal of its certification of registration each year, and sets forth renewal requirements and procedures. Section 12.109 sets forth the appeal process if an application or renewal is denied.

Proposed Subchapter C contains the general standards of independent review. Proposed §12.201 describes an independent review plan, and lists components which must be included by such plan. Personnel and credentialing requirements for independent review organizations are set forth in proposed §12.202. Proposed §12.203 states that certain conflicts render an independent review organization ineligible for certification. Proposed §12.204 describes prohibitions of certain activities of independent review organizations. The independent review organization's contact with and receipt of information from health care providers and patients is governed by proposed §12.205. Proposed §12.206 contains information regarding requirements of notice of determinations made by independent review organizations. Proposed §12.207 deals with requirements of an independent review organization's telephone accessibility. Confidentiality requirements with regard to independent review are set forth in proposed §12.208.

Proposed Subchapter D contains the regulations for enforcement of the standards of independent review. Proposed §12.301 describes how a complaint regarding an independent review organization may be filed with the department, and provides that the department may make necessary inquiries to investigate such complaints. Proposed §12.302 provides that the department may make on-site examinations as needed to ensure the quality, availability, and accessibility of independent review services. Regulations governing the prosecution of administrative violations are set forth in proposed §12.303.

Proposed Subchapter E contains information regarding fees and payment for independent review. Proposed §12.401 provides for the department to establish, administer, and enforce certification and renewal fees for independent review organizations. Specialty classifications of independent review are divided into two tiers for purposes of setting fees in proposed §12.402. Proposed §12.403 sets forth fee amounts for the two specialty classification tiers prescribed by proposed §12.402. Proposed §12.404 sets forth information regarding the payment of fees established in this subchapter. Proposed §12.405 deals with failure of payors to pay invoices for independent review within a certain time frame. Section 12.406 sets forth the application and renewal fees.

Proposed Subchapter F describes the random assignment of independent review organizations by the department. The manner in which requests for independent review are made to the department is set forth in proposed §12.501. The procedure for random assignment of requests for independent review to independent review organizations by the department is described in proposed §12.502.

Edna Ramon Butts, Senior Associate Commissioner of Regulation and Safety, has determined that for each year of the first five years the proposed chapter is in effect, the fiscal impact on

state government will be the cost to the Texas Department of Insurance associated with the development and operation of a computer system which allows a utilization review agent to request an independent review and to receive an assignment to an independent review organization. The department estimates the costs of the development and operation of such system will be $63,849. The department estimates that a maximum of 4400 independent reviews will be requested per year. In addition, the department estimates that the cost associated with notification of assignment to the patient and the patient's provider of record will be $.32 per notification, or $.64 per request for independent review. The total cost to the department for notification is estimated to be a maximum of $2816 per year. There will be no fiscal impact on local government as a result of enforcing or administering the proposed chapter. There will be no measurable effect on local employment or local economy.

Ms. Butts also has determined that for each year of the first five years the proposed chapter is in effect, the public benefits anticipated as a result of the proposed sections will be a cost effective mechanism to assure greater access to necessary health care by consumers and to promote quality of care by providing independent review of issues of medical necessity. The proposed chapter enables those individuals who have received an adverse determination of medical necessity an additional review process on the question of medical necessity and the receipt of benefits from health insurers, health maintenance organizations and other managed care entities. This review will be an independent review performed by an entity with no relation to the payor of benefits and will ensure that requested reviews of adverse determinations are conducted fairly and impartially.

Ms. Butts estimates that for the first year that the proposed chapter is in effect, the costs to the utilization review agents to access the computer system for requesting an independent review and receiving an assignment to an independent review organization will be a one time cost of $100 for a modem, and $240 per year Internet provider fees, if such modem and Internet provider services are not already available. Further, the department estimates the utilization review agent will pay the independent review organization for the cost of the independent review in accordance with these rules. The number of appeals of adverse determinations upheld on appeal reported in 1996 by utilization review agents certified by the department was 2910. This figure was a 70 percent increase from the figure reported in 1995. While the department believes there will be a further increase in 1997, it would be exceptional for the increase to continue at this level. The department assumes that there will be an increase in the number of persons enrolled in health maintenance organizations and that the number of appeals of adverse determinations upheld will increase. The average annual increase in enrollment in basic service HMOs, over the last three years, was 20% and for single service HMOs the average increase was 31%. The department assumes based on increased enrollment and increased consumer appeals that there will be an increase of a maximum of 50 percent over the figure reported in 1996 of 2910. Therefore, the department estimates that there will be a maximum of 4400 independent reviews requested in the first year of the program. The cost of a review will be between $460 and $650, depending upon the applicable specialty tier required. The department assumes that 75% of independent reviews will involve tier one specialty reviews, and 25% will involve tier 2 specialty reviews, for a weighted average of approximately $600 per review. The total cost to utilization review agents is estimated to be a maximum of $2.7 million per year, and may, depending on the distribution of reviews, be less.

In addition, the utilization review agent may be billed by the independent review organization for copies of any medical records necessary to conduct the independent review which were not provided to the independent review organization by the utilization review agent at a cost not to exceed the cost of copying set by the Texas Workers' Compensation Commission for records, which are set at $.50 per page for copies of reports or clinical notes, and may not include any costs that are otherwise recouped as a part of the charge for health care. The number of pages of medical records required may vary from 10 to 400 pages. In the event the number of pages is 400, the maximum cost will be $200. The utilization review agent may recover the costs from the payor associated with the independent review. The payor may be billed by the utilization review agent for the costs of the independent review and any medical records necessary to conduct the independent review not provided by the utilization review agent. No additional cost will be incurred by the payor that have not already been calculated in determining the utilization review agent's costs.

The department estimates that the costs to the independent review organizations to access the computer system for acknowledgment of receipt of medical and other records from the utilization review agent and notification of the independent review organization's determination will be a one time cost of $100 for a modem, and $240 per year Internet provider fees, if such modem and Internet provider services are not already available. Further, the department has determined that the independent review organization will pay an application fee of $800 for the first year and $200 each year thereafter for renewal of the certificate of registration. The utilization review agent will be billed by the independent review organization for the costs of the independent review and any medical records necessary to conduct the independent review not provided by the utilization review agent. Therefore, the independent review organization will not incur any costs associated with the independent review. The department may examine an independent review agent prior to certification as an independent review organization. The costs associated with an examination are determined to be $327.00 per day at an average of two days per exam. Total costs per examination is expected to average $654.00. In addition, the department is authorized to examine the independent review organization annually or as frequently as necessary at any time after certification. The independent review organization will be required to pay for the costs associated with any on-site examination by the Texas Department of Insurance.

The assumptions on which these costs are based may change substantially as the department receives data during the comment period. On the basis of cost per hour of labor, there is no anticipated difference in cost of compliance between small and large businesses.

Comments on the proposal must be submitted within 30 days after publication of the proposed sections in the Texas Register to Caroline Scott, General Counsel and Chief Clerk, Mail Code

113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be submitted to Edna Ramón Butts, Senior Associate Commissioner, Regulation and Safety, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

Subchapter A. General Provisions

28 TAC §§12.1-12.5

The new sections are proposed under Insurance Code, Articles 21.58C and 1.03A. The Insurance Code, Article 21.58C provides that the department may promulgate standards and rules for the certification, selection, and operation of independent review organizations to perform independent review. The Insurance Code, Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance as authorized by statute. The Government Code, Chapter 2001, §§2001.004 et seq. authorizes and requires each state agency to adopt rules of practice setting forth the nature and requirement of available procedures and prescribes the procedures for adoption of rules by a state administrative agency.

The following articles are affected by this proposal: Insurance Code, Articles 20A, 21.58A and 21.58C

§12.1. Statutory Basis.

This chapter implements the provisions of Senate Bill 386 enacted by Acts, 1997, 75th Legislature, Regular Session, codified as the Texas Insurance Code, Article 21.58C, effective September 1, 1997.

§12.2. Severability.

Where any terms or sections of this chapter are determined by a court of competent jurisdiction to be inconsistent with any statutes of this state or these United States, or to be unconstitutional, the remaining terms and provisions of this chapter shall remain in effect.

§12.3. Effect of Chapter.

The sections in this chapter are prescribed to govern the performance of appropriate statutory and regulatory function and are not to be construed as limitations upon the exercise of statutory authority by the Commissioner of Insurance.

§12.4. Applicability.

All independent review organizations performing independent reviews of adverse determinations made in Texas as requested by utilization review agents, regardless of where the independent review activities are physically based, must comply with this chapter.

§12.5. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

Act – Insurance Code, Article 21.58C, entitled Standards for Independent Review Organizations.

Active practice - 20 hours per week in the examination, diagnosis, and/or treatment of patients.

Administrator – A person holding a certificate of authority under the Insurance Code, Article 21.07-6.

Adverse determination – A determination by a utilization review agent that the health care services furnished or proposed to be furnished to a patient are not medically necessary or not appropriate.

Affiliate – A person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the person specified.

Commissioner – The Commissioner of Insurance.

Department – Texas Department of Insurance.

Dental plan – An insurance policy or health benefit plan, including a policy written by a company subject to the Insurance Code, Chapter 20, that provides coverage for expenses for dental services.

Dentist – A licensed doctor of dentistry holding either a D.D.S. or a D.M.D. degree.

Emergency care – Health care services provided in a hospital emergency facility or comparable facility to evaluate and stabilize medical conditions of a recent onset and severity, including but not limited to severe pain, that would lead a prudent layperson possessing an average knowledge of medicine and health to believe that his or her condition, sickness, or injury is of such a nature that failure to get immediate medical care could result in:

(A) placing the patient's health in serious jeopardy;

(B) serious impairment to bodily functions;

(C) serious dysfunction of any bodily organ or part;

(D) serious disfigurement; or

(E) in the case of a pregnant woman, serious jeopardy to the health of the fetus.

Health benefit plan – A plan of benefits that defines the coverage provisions for health care offered or provided by any organization, public or private, other than health insurance.

Health care provider – Any person, corporation, facility or institution, licensed by a state to provide or otherwise lawfully providing health care services, that is eligible for independent reimbursement for those services.

Health insurance policy – An insurance policy, including a policy subject to the Insurance Code, Chapter 20, that provides coverage for medical or surgical expenses incurred as a result of accident or sickness.

Independent review – A system for final administrative review of the medical necessity and appropriateness of health care services being provided or proposed to be provided to an individual who resides within the state by a designated independent review organization.

Independent review organization – An entity that is certified by the commissioner to conduct independent review under the authority of the Act. Such entity must have the capacity for independent review of all specialty classifications and subspecialties thereof contained in the two tiered structure of specialty classifications set forth in §12.402 of this title (relating to Classifications of Specialty).

Independent review plan – The screening criteria and review procedures of an independent review organization.

Life-threatening condition – A disease or condition for which the likelihood of death is probable unless the course of the disease or condition is interrupted.

Medical and scientific evidence – Evidence derived from the following sources:

(A) Peer-reviewed scientific studies published in or accepted forpublication by medical journals that meet nationally recognized requirements for scientific manuscripts and that submit most of their published articles for review by experts who are not part of the editorial staff.

(B) Peer-reviewed literature, biomedical compendia and other medical literature that meet the criteria of the National Institute of Health's National Library of Medicine for indexing in Index Medicus, Excerpt–Medicus (EMBASE), Medline, and MEDLARS database Health Services Technology Assessment Research (HSTAR).

(C) Medical journals recognized by the Secretary of Health and Human Services, under Section 1961(t)(2) of the Social Security Act.

(D) The following standard reference compendia: The American Hospital Formulary Service Drug Information, the American Medical Association Drug Evaluation, the American Dental Association Accepted Dental Therapeutics, and the United States Pharmacopoeia- Drug Information.

(E) Findings, studies or research conducted by or under the auspices of federal government agencies and nationally recognized federal research institute including the Federal Agency for Health Care Policy and Research, National Institutes of Health, National Cancer Institute National Academy of Sciences, Health Care Financing Administration, Congressional Office of Technology Assessment, and any national board recognized by the National Institutes of Health for the purpose of evaluating the medical value of health services.

(F) Peer reviewed abstracts accepted for presentation at major medical association meetings.

Nurse – A professional or registered nurse, licensed vocational nurse, or licensed practical nurse.

Open records law – Chapter 552, Government Code.

Patient – A person covered by a health insurance policy or health benefit plan on whose behalf independent review is sought. This term includes a person who is covered as an eligible dependent of another person.

Payor – An insurer writing health insurance policies; any health maintenance organization, self-insurance plan, or any other person or entity which provides, offers to provide, or administers hospital, outpatient, medical, or other health benefits to persons treated by a health care provider in this state pursuant to any policy, plan, or contract.

Person – An individual, corporation, partnership, association, joint stock company, trust, unincorporated organization, any similar entity, or any combination of the foregoing acting in concert.

Physician – A licensed doctor of medicine or a doctor of osteopathy.

Provider of record – The physician or other health care provider that has primary responsibility for the care, treatment, and services rendered or requested on behalf of the patient, or the physician or health care provider that has rendered or requested to provide the care, treatment, and/or services to the patient. This definition includes any health care facility where treatment is rendered on an inpatient or outpatient basis.

Screening criteria – The written policies, medical protocols, or guidelines used by the independent review organization as part of the independent review.

Utilization review agent – A person holding a certificate of registration under the Insurance Code, Article 21.58A.

Working day – A weekday, excluding New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711336
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463-6327

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Subchapter B. Certification of Independent Review Organizations

28 TAC §§12.101-12.109

The new sections are proposed under Insurance Code, Articles 21.58C and 1.03A. The Insurance Code, Article 21.58C provides that the department may promulgate standards and rules for the certification, selection, and operation of independent review organizations to perform independent review. The Insurance Code, Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance as authorized by statute. The Government Code, Chapter 2001, §§2001.004 et seq. authorizes and requires each state agency to adopt rules of practice setting forth the nature and requirement of available procedures and prescribes the procedures for adoption of rules by a state administrative agency.

The following articles are affected by this proposal: Insurance Code, Articles 20A, 21.58A and 21.58C

§12.101. Where to File Application.

An application for certification of an independent review organization and certification fee must be filed with the Texas Department of Insurance at the following address: Texas Department of Insurance, Mail Code 108-6A, P.O. Box 149104, Austin, Texas 78714-9104.

§12.102. How to Obtain Forms.

The application must be submitted on a form which can be obtained from the Texas Department of Insurance, Mail Code 108-6A, 333 Guadalupe, P.O. Box 149104, Austin, Texas 78714-9104.

§12.103. Information Required.

The applicant must provide information required by the commissioner, which includes, but is not limited to the following:

(1) a summary of the independent review plan which meets the requirements of §12.201 of this title (relating to Independent Review Plan) and must include:

(A) a summary description of screening criteria and review procedures to be used to determine medical necessity and appropriateness of health care;

(B) a certification signed by an authorized representative that such screening criteria and review procedures to be applied in review determination are established with input from appropriate health care providers and approved by physicians in accordance with §12.201(3) of this title (relating to Independent Review Plans); and

(C) procedures ensuring that the information regarding the reviewing physicians and providers is updated in accordance with §12.105(d) of this title (relating to Revisions During Review Process) and §12.108(e) of this title (relating to Renewal of Certificate of Registration) to ensure the independence of each health care provider or physician making review determinations.

(2) copies of policies and procedures which ensure that all applicable state and federal laws to protect the confidentiality of medical records and personal information are followed. These procedures must comply with §12.208 of this title (relating to Confidentiality);

(3) a certification signed by an authorized representative that the independent review organization will comply with the provisions of the Act;

(4) a description of personnel and credentialing, and a completed profile for each physician and provider, both as described in §12.202 of this title (relating to Personnel and Credentialing);

(5) a description of hours of operation and how the independent review organization may be contacted during weekends and holidays, as set forth in §12.207 of this title (relating to Independent Review Organization's Telephone Access);

(6) the organizational information, documents and all amendments, including:

(A) the bylaws, rules and regulations, or any similar document regulating the conduct of the internal affairs of the applicant with a notarized certification bearing the original signature of an officer or authorized representative of the applicant that they are true, accurate, and complete copies of the originals;

(B) for an applicant that is publicly held, the name of each stockholder or owner of more than five percent of any stock or options;

(C) a chart showing the internal organizational structure of the applicant's management and administrative staff; and

(D) a chart showing contractual arrangements of the independent review system.

(7) the name of any holder of bonds or notes of the applicant that exceed $100,000;

(8) the name and type of business of each corporation or other organization that the applicant controls or is affiliated with and the nature and extent of the affiliation or control and a chart or list clearly identifying the relationships between the applicant and any affiliates;

(9) biographical information about officers, directors, and staff;

(A) the independent review organization must submit the name and biographical information for each director, officer, and executive of the applicant, any entity listed under paragraph (8) of this section, and each person conducting independent review, and a description of any relationship the named individual has with:

(i) a health benefit plan;

(ii) a health maintenance organization;

(iii) an insurer;

(iv) a utilization review agent;

(v) a nonprofit health corporation;

(vi) a payor;

(vii) a health care provider; or

(viii) a group representing any of the entities described by clauses (i)-(viii) of this subparagraph.

(B) any relationship between the independent review organization and any affiliate or other organization in which an officer, director, or employee of the independent review organization holds a five percent or more interest;

(C) a list of any currently outstanding loans or contracts to provide services between the applicant and the affiliates;

(10) information related to out-of-state licensure and service of legal process. All applicants must furnish a copy of the certificate of registration or other licensing document from the domiciliary state's licensing authority. As a condition of being certified to conduct the business of independent review in this state, an independent review organization that maintains its principal offices or any portion of its books, records, or accounts outside this state must appoint and maintain a person in this state as attorney for service of process on whom all judicial and administrative process, notices, or demands may be served, and must notify the department of any change of appointment or appointee's address immediately;

(11) written disclosure of types of compensation arrangements made to physicians and providers in exchange for the provision of independent review; and

(12) the percentage of the applicant's revenues that are anticipated to be derived from independent reviews conducted.

§12.104. Review of Application.

The application process is as follows:

(1) After review, the department shall either certify or deny the application, and give the applicant written notice of any omission or deficiencies noted as a result of the review conducted pursuant to this section.

(2) The applicant must correct the omissions or deficiencies in the application within 30 days of the date of the department's notice of such omissions or deficiencies.

(3) The applicant may waive any of the time limits described in this subsection, except as set forth in paragraph (2) of this section. The applicant may waive the time limit in paragraph (2) of this subsection only with the consent of the department.

(4) Department staff shall notify the applicant of any omission or deficiencies noted during its review, inform the applicant that the application shall be denied, absent corrections. If the time

required for the revisions will exceed 30 days, the applicant must request additional time within which to make the revisions. The applicant must specifically set out the length of time requested, not to exceed 90 days. Additional delays may be requested. The request for any additional delays must set out the need for the additional delay in sufficient detail for the commissioner or his or her designee to determine whether good cause for such delay exists. The department must review all revisions within 60 days of receipt. The commissioner or his or her designee may grant or deny any request for an extension of time at his or her discretion.

(5) The department shall maintain a charter file which shall contain the application, notices of omissions or deficiencies, responses, and any written materials generated by any person that were considered by the department in evaluating the application.

§12.105. Revisions During Review Process.

(a) Revisions during the review of the application must be addressed to: Texas Department of Insurance, Mail Code 108-6A, 333 Guadalupe, P.O. Box 149104, Austin, Texas 78714-9104. The applicant must include an original and one copy of the transmittal letter, plus the original and one copy of any revision required by this subchapter.

(b) The applicant must submit an original plus one copy of any revised page. Each revision to the organizational document or bylaws must be accompanied by the notarized certification of an officer or authorized representative of the applicant that the item submitted is true, accurate, and complete, and, if the item is a copy, by a notarized certification that the copy is a true, accurate, and complete copy of the original.

(c) If a page is to be revised, a complete new page must be submitted with the changed item or information "red-lined" or otherwise clearly designated on all copies except the original page, which shall be placed in the charter file.

(d) The independent review organization shall report any material changes in the information in the application or renewal form referred to in this chapter not later than the 30th day before the date on which the change takes effect.

(e) Compliance with subsection (d) of this section is exempted in the event that a contracted specialist is unavailable for review, and subsequent immediate contracting with a new specialist is necessary to complete independent review within the timeframes set forth in this chapter.

(f) The independent review organization shall notify the department within 10 days of any contracts entered into pursuant to subsection (e) of this section, and shall include in such notification a complete explanation of the circumstances necessitating such contracts.

§12.106. Qualifying Examinations.

The commissioner or his or her designee may conduct an on-site qualifying examination of an applicant as a requirement of certification as an independent review organization. Documents must be available for inspection at the time of such qualifying examination at the administrative offices of the independent review organization as set forth in §12.302 of this title (relating to On-Site Review by the Texas Department of Insurance).

§12.107. Withdrawal of an Application.

(a) Upon written notice to the department, an applicant may request withdrawal of an application from consideration by the department.

(b) Upon the department's receipt of a request to withdraw an application pursuant to this section, the application shall be withdrawn from consideration. Subsequent applications by the same applicant must be new submissions in their entirety.

§12.108. Renewal of Certificate of Registration.

(a) The commissioner shall designate annually each organization that meets the standards as an independent review organization.

(b) An independent review organization must apply for renewal of its certificate of registration every year, not later than the anniversary date of the issuance of the registration. A renewal form must be used for this purpose. The renewal form can be obtained from the address listed in §12.102 of this title (relating to How to Obtain Forms). The completed renewal form, a summary of the current screening criteria, renewal fee, and a certification that no material changes exist that have not already been filed with the department must be submitted to the department at the address listed in §12.101 of this title (relating to Where to File Application). Material changes shall include changes relating to physicians or providers performing independent review.

(c) An independent review organization may continue to operate under its certificate of registration after a completed renewal application form and a summary of the current screening criteria has been timely received by the department until the renewal is finally denied or issued by the department.

(d) If a completed renewal form and a summary of the screening criteria is not received prior to the anniversary date of the year in which the certificate of registration must be renewed, the certificate of registration will automatically expire and the independent review organization must complete and submit a new application for certificate of registration.

(e) The independent review organization shall report any material changes in the information in the application or renewal form referred to in this chapter, including changes relating to physicians and providers performing independent review, not later than the 30th day before the date on which the change takes effect.

(f) Compliance with subsection (e) of this section is exempted in the event that a contracted specialist is unavailable for review, and subsequent immediate contracting with a new specialist is necessary to complete independent review within the timeframes set forth in this chapter.

(g) The independent review organization shall notify the department within 10 days of any contracts entered into pursuant to subsection (f) of this section, and shall include in the notification a complete explanation of the circumstances necessitating such contracts.

§12.109. Appeal of Denial of Application or Renewal.

If an application or renewal is initially denied under this subchapter, the applicant or registrant may appeal such denial pursuant to the provisions of Chapter 1, Subchapter A of this title (relating to Rules of Practice and Procedure) and the Government Code, Chapter 2001.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711337
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463-6327

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Subchapter C. General Standards of Independent Review

28 TAC §12.201-12.208

The new sections are proposed under Insurance Code, Articles 21.58C and 1.03A. The Insurance Code, Article 21.58C provides that the department may promulgate standards and rules for the certification, selection, and operation of independent review organizations to perform independent review. The Insurance Code, Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance as authorized by statute. The Government Code, Chapter 2001, §§2001.004 et seq. authorizes and requires each state agency to adopt rules of practice setting forth the nature and requirement of available procedures and prescribes the procedures for adoption of rules by a state administrative agency.

The following articles are affected by this proposal: Insurance Code, Articles 20A, 21.58A and 21.58C

§12.201. Independent Review Plan.

The independent review plan shall be conducted in accordance with standards developed with input from appropriate health care providers, and reviewed and approved by a physician. The independent review plan shall include the following components:

(1) a description of the elements of review which the independent review organization provides;

(2) written procedures for:

(A) notification of the independent review organization's determinations provided to the patient or a person acting on behalf of the patient, the patient's provider of record, and the utilization review agent as addressed in §12.206 of this title (relating to Notice of Determinations Made by Independent Review Organizations);

(B) review, including:

(i) any form used during the review process;

(ii) time frames that shall be met during the review;

(C) accessing appropriate specialty review;

(D) contacting and receiving information from health care providers in accordance with §12.205 of this title (relating to Independent Review Organization's Contact With and Receipt of Information from Health Care Providers);

(3) screening criteria and independent review decisions. Each independent review organization shall utilize written medically acceptable screening criteria based on medical and scientific evidence, and review procedures which are established and periodically evaluated and updated with appropriate involvement from physicians, including practicing physicians, and other health care providers. Criteria must be objective, clinically valid, compatible with established principles of health care, and flexible enough to allow deviations from the norms when justified on a case-by-case basis. Screening criteria must be used only as a tool in the review process. Such written screening criteria and review procedures shall be available for review and inspection and copying as necessary by the commissioner or his or her designated representative in order for the commissioner to carry out his or her lawful duties under the Insurance Code. Independent review decisions shall be made in accordance with accepted current medical criteria, taking into account the special circumstances of each case that may require a deviation from the norm. All independent review determinations shall be reviewed by the appropriate physician or dentist to determine medical necessity.

§12.202. Personnel and Credentialing.

(a) Personnel employed by or under contract with the independent review organization to perform independent review shall be appropriately trained and qualified and, if applicable, currently licensed, registered, or certified. Such personnel shall be currently involved in an active practice. An exception to the active practice requirement shall be the medical director of the independent review organization. Personnel who obtain information directly from a physician, dentist, or other health care provider, either orally or in writing, and who are not physicians or dentists, shall be nurses, physician assistants, or health care providers qualified to provide the service requested by the provider. This provision shall not be interpreted to require such qualifications for personnel who perform clerical or administrative tasks.

(b) The independent review organization is required to provide to the commissioner the number, type, and minimum qualifications of the personnel either employed or under contract to perform the independent review. Independent review organizations shall be required to adopt written procedures used to determine whether physicians or other health care providers utilized by the independent review organization are licensed, qualified, in good standing, and appropriately trained, and must maintain records on such. In addition, the independent review organization must maintain complete profiles of anyone conducting independent review. Such profiles must include all information required by the department in its application form, and must be kept current.

(c) An independent review organization shall be under the direction of a physician currently licensed and in good standing to practice medicine by a state licensing agency in the United States.

(d) The independent review organization is required to provide to the department a copy of the applicant's credentialing policies and procedures, including:

(1) a description of the categories and qualifications of persons employed or under contract to perform independent review as described in this section;

(2) copies of policies and procedures for orientation and training of persons who perform independent review, and evidence that the applicant meets any applicable provisions of this chapter relating to the qualifications of independent review organizations or the performance of independent review.

(e) Notwithstanding subsections (c) and (d) of this section, a physician or dentist whose license has been revoked by any state

licensing agency in the United States is not eligible to direct or conduct independent review.

§12.203. Conflicts of Interest Prohibited.

A person that is a subsidiary of, or in any way owned or controlled by, a payor or trade or professional association of payors is not eligible for certification under this chapter. The department shall have the discretion to determine whether any other conflicts exist.

§12.204. Prohibitions of Certain Activities of Independent Review Organizations.

(a) An independent review organization shall not set or impose any notice or other review procedures contrary to the requirements of the health insurance policy or health benefit plan other than those set forth in this chapter.

(b) An independent review organization may not permit or provide compensation or anything of value to its physicians or providers that would directly or indirectly affect an independent review decision.

§12.205. Independent Review Organization Contact With and Receipt of Information from Health Care Providers and Patients.

(a) A health care provider may designate one or more individuals as the initial contact or contacts for independent review organizations seeking routine information or data. In no event shall the designation of such an individual or individuals preclude an independent review organization or medical advisor from contacting a health care provider or others in his or her employ where a review might otherwise be unreasonably delayed or where the designated individual is unable to provide the necessary information or data requested by the independent review organization.

(b) An independent review organization may not engage in unnecessary or unreasonably repetitive contacts with the health care provider or patient and shall base the frequency of contacts or reviews on the severity or complexity of the patient's condition or on necessary treatment and discharge planning activity.

(c) In addition to pertinent files containing medical and personal information, the utilization review agent shall be responsible for timely delivering to the independent review organization any written narrative supplied by the patient pursuant to Insurance Code, Article 21.58A. However, in instances of emergency or life-threatening condition, the independent review organization shall contact the patient or person acting on behalf of the patient, and provider directly.

(d) An independent review organization shall notify the department within 24 hours of receipt of information regarding an independent review from the requesting utilization review agent that such documents have been delivered and the date of such delivery.

(e) An independent review organization shall reimburse health care providers for the reasonable costs of providing medical information in writing, including copying and transmitting any requested patient records or other documents. A health care provider's charge for providing medical information to an independent review organization shall not exceed the cost of copying set by rules of the Texas Workers' Compensation Commission for records and may not include any costs that are otherwise recouped as a part of the charge for health care. Such expense shall be reimbursed by the payor as an expense of independent review.

(f) When conducting independent review, the independent review organization shall collect any information necessary to review the adverse determination not already provided by the utilization review agent. This information may include identifying information about the patient, the benefit plan, the treating health care provider, and/or facilities rendering care. It may also include clinical information regarding the diagnoses of the patient and the medical history of the patient relevant to the diagnoses; the patient's prognosis; and/or the treatment plan prescribed by the treating health care provider along with the provider's justification for the treatment plan.

(g) The independent review organization should share all clinical and demographic information on individual patients among its various divisions to avoid duplication of requests for information from patients or providers.

§12.206. Notice of Determinations Made by Independent Review Organizations.

(a) An independent review organization shall notify the patient or a person acting on behalf of the patient, the patient's provider of record, the utilization review agent, and the department of a determination made in an independent review.

(b) The notification required by this section must be mailed or otherwise transmitted not later than the earlier of:

(1) the 15th day after the date the independent review organization receives the information necessary to make a determination; or

(2) the 20th day after the date the independent review organization receives the request for the independent review; and

(c) in the case of a life-threatening condition, by telephone to be followed by facsimile, electronic mail, or other method of transmission not later than the earlier of:

(1) the 5th day after the date the independent review organization receives the information necessary to make a determination; or

(2) the 8th day after the date the independent review organization receives the request for independent review.

(d) Notification of determination by the independent review organization must include:

(1) the specific reasons, including the clinical basis, for the determination;

(2) a description and the source of the screening criteria that were utilized as guidelines in making the determination;

(3) a description of the qualifications of the reviewing physician or provider; and

(4) a certification by the reviewing physician or provider that no known conflicts of interest exist between him or her and any of the treating physicians or providers or any of the physicians or providers who reviewed the case for determination prior to referral to the independent review organization.

§12.207. Independent Review Organizations' Telephone Access.

(a) An independent review organization shall have appropriate personnel reasonably available to utilization review agents by telephone at least 40 hours per week during normal business hours, in both time zones in Texas, if applicable, to discuss patients' care and allow response to telephone review questions.

(b) An independent review organization must have a telephone system capable of accepting or recording or providing instructions to incoming calls from utilization review agents during other than normal business hours and shall respond to such calls not later than two working days of the later of the date on which the call was received or the date the details necessary to respond have been received from the caller.

§12.208. Confidentiality.

(a) An independent review organization shall preserve the confidentiality of individual medical records, personal information, and any proprietary information provided by payors to the extent required by law.

(b) An independent review organization may not disclose or publish individual medical records or other confidential information about a patient without the prior written consent of the patient or as otherwise required by law. An independent review organization may provide confidential information to a third party under contract or affiliated with the independent review organization for the sole purpose of performing or assisting with independent review. Information provided to third parties shall remain confidential.

(c) The independent review organization may not publish data which identifies a particular physician or health care provider, including any quality review studies or performance tracking data, without prior written consent of the involved provider. This prohibition does not apply to internal systems or reports used by the independent review organization.

(d) All patient, physician, and health care provider data shall be maintained by the independent review organization in a confidential manner which prevents unauthorized disclosure to third parties. Nothing in this chapter shall be construed to allow an independent review organization to take actions that violate a state or federal statute or regulation concerning confidentiality of patient records.

(e) To assure confidentiality, an independent review organization must, when contacting a utilization review agent, a physician's or provider's office, or hospital, provide its certification number and the caller's name and professional qualifications to the provider or the provider's named independent review representative.

(f) The independent review organization's procedures shall specify that specific information exchanged for the purpose of conducting review will be considered confidential, be used by the independent review organization solely for the purposes of independent review, and be shared by the independent review organization with only those third parties who have authority to receive such information. The independent review organization's plan shall specify the procedures that are in place to assure confidentiality and that the independent review organization agrees to abide by any federal and state laws governing the issue of confidentiality. Summary data which does not provide sufficient information to allow identification of individual patients or providers need not be considered confidential.

(g) Medical records and patient-specific information shall be maintained by the independent review organization in a secure area with access limited to essential personnel only.

(h) Information generated and obtained by the independent review organization in the course of the review shall be retained for at least two years if the information relates to a case for which an adverse decision was made at any point or if the information relates to a case which may be reopened.

(i) Destruction of documents in the custody of the independent review organization that contain confidential patient information or physician or health care provider financial data shall be by a method which ensures complete destruction of the information, when the organization determines that the information is no longer needed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711335
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463-6327

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Subchapter D. Enforcement of Independent Review Standards

28 TAC §§12.301–12.303

The new sections are proposed under Insurance Code, Articles 21.58C and 1.03A. The Insurance Code, Article 21.58C provides that the department may promulgate standards and rules for the certification, selection, and operation of independent review organizations to perform independent review. The Insurance Code, Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance as authorized by statute. The Government Code, Chapter 2001, §§2001.004 et seq. authorizes and requires each state agency to adopt rules of practice setting forth the nature and requirement of available procedures and prescribes the procedures for adoption of rules by a state administrative agency.

The following articles are affected by this proposal: Insurance Code, Articles 20A, 21.58A and 21.58C.

§12.301. Complaints and Information.

(a) Complaints to the department. Within a reasonable time period, upon receipt of a written complaint alleging a violation of this chapter or the Act by an independent review organization from a patient's health care provider, a person acting on behalf of the patient, the patient, the payor, or a utilization review agent, the department shall investigate the complaint and furnish a written response to the complainant and the independent review organization named.

(b) Authority of the department to make inquiries. In addition to the authority of the department to respond to complaints described in subsection (a) of this section, the department is authorized to address inquiries to any independent review organization in relation to the organization's business condition or any matter connected with its transactions which the department may deem necessary for the public good or for a proper discharge of its duties. It shall be the duty of the independent review organization to promptly answer such inquiries in writing.

§12.302. On-site Review by the Texas Department of Insurance.

(a) The department is authorized to make examinations concerning the quality, availability, and accessibility of independent review services as often as is deemed necessary.

(b) A representative of the commissioner is authorized to examine the administrative offices or any branch office of each independent review organization annually, or as frequently as necessary, for the purpose of reviewing the books and operations of the independent review organization.

(c) The independent review organization must make available during such on-site reviews the following documents:

(1) the minutes of the applicant's organizational meetings, indicating the time of each meeting and the date;

(2) current documentation for all information required in the application for certification;

(3) any other records concerning the operation of the independent review organization.

§12.303. Administrative Violations.

(a) If the department believes that any person conducting independent review is in violation of the Act or this chapter, the department shall notify the independent review organization of the alleged violation and may compel the production of any and all documents or other information as necessary to determine whether or not such violation has taken place.

(b) The department may initiate appropriate proceedings under this chapter.

(c) Proceedings under this chapter are a contested case for the purpose of the Government Code, Chapter 2001.

(d) If the commissioner or his or her designee determines that the independent review organization has violated or is violating any provision of the Act or this chapter, the commissioner or his or her designee may:

(1) impose sanctions under the Insurance Code, Article 1.10;

(2) issue a cease and desist order under the Insurance Code, Article 1.10A; and/or

(3) assess administrative penalties under the Insurance Code, Article 1.10E.

(e) If the independent review organization has violated or is violating any provisions of the Insurance Code other than the Act, or applicable rules of the department, sanctions may be imposed under the Insurance Code, Article 1.10 or 1.10A.

(f) The commission of fraudulent or deceptive acts or omissions in obtaining, attempting to obtain, or use of certification or designation as an independent review organization shall be a violation of the Act.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711338
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–6327

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Subchapter E. Fees and Payment

28 TAC §§12.401–12.406

The new sections are proposed under Insurance Code, Articles 21.58C and 1.03A. The Insurance Code, Article 21.58C provides that the department may promulgate standards and rules for the certification, selection, and operation of independent review organizations to perform independent review. The Insurance Code, Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance as authorized by statute. The Government Code, Chapter 2001, §§2001.004 et seq. authorizes and requires each state agency to adopt rules of practice setting forth the nature and requirement of available procedures and prescribes the procedures for adoption of rules by a state administrative agency.

The following articles are affected by this proposal: Insurance Code, Articles 20A, 21.58A and 21.58C.

§12.401. Fees.

(a) The commissioner shall establish, administer, and enforce the certification and renewal fees under this section in amounts not greater than necessary to cover the cost of administration of this chapter.

(b) Fees for independent review shall be determined by the department, and shall reflect in general the market value of services rendered.

§12.402. Classification of Specialty.

Fees for independent review shall be based on a two tiered structure of specialty classificaitons as follows:

(1) Tier one fees will be for independent review of medical or surgical care rendered by a doctor of medicine or doctor of osteopathy.

(2) Tier two fees will be for the independent review in the specialties of podiatry, optometry, dental, audiology, speech-language pathology, master social work, dietetics, professional counseling, psychology, occupational therapy, physical therapy, marriage and family therapy, and chemical dependency counseling, and any subspecialties thereof.

§12.403. Fee Amounts.

Fees to be paid to independent review organizations by utilization review agents for each independent review are as follows:

(1) tier one: $650; and

(2) tier two: $460.

§12.404. Payment of Fees.

(a) Independent review organizations shall bill utilization review agents directly for fees for independent review.

(b) Independent review organizations may also bill utilization review agents for copy expenses related to review as set forth in

§12.205 of this title (relating to Independent Review Organization Contact With and Receipt of Information from Heath Care Providers and Patients).

(c) At the time of billing, independent review organizations shall provide to the department a copy of such bill for information.

(d) Utilization review agents shall pay independent review organizations directly within 30 days of receipt of invoice.

(e) Utilization review agents may recover from the payors the costs associated with the independent review.

§12.405. Failure to Pay Invoice.

Failure by utilization review agents to pay invoices from an independent review organization within 30 days of receipt shall constitute a violation subject to penalty under §12.303 of this title (relating to Administrative Violations).

§12.406. Certification and Renewal Fees.

Fees to be paid to the department for the original application for certification as an independent review organization is $800. The fee for renewal of certification is $200.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711341
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–6327

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Subchapter F. Random Assignment of Independent Review Organizations

28 TAC §12.501, §12.502

The new sections are proposed under Insurance Code, Articles 21.58C and 1.03A. The Insurance Code, Article 21.58C provides that the department may promulgate standards and rules for the certification, selection, and operation of independent review organizations to perform independent review. The Insurance Code, Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance as authorized by statute. The Government Code, Chapter 2001, §§2001.004 et seq. authorizes and requires each state agency to adopt rules of practice setting forth the nature and requirement of available procedures and prescribes the procedures for adoption of rules by a state administrative agency.

The following articles are affected by this proposal: Insurance Code, Articles 20A, 21.58A and 21.58C.

§12.501. Requests for Independent Review.

Requests for independent review shall be made to the department on behalf of the patient by the utilization review agent pursuant to Insurance Code, Article 21.58A, §6A and Chapter 19, Subchapter R of this title (relating to Utilization Review Agents).

§12.502. Random Assignment.

(a) The department shall randomly assign each request for independent review to an independent review organization, and shall notify the utilization review agent, the independent review organization, the patient or a person acting on behalf of the patient, and the provider of record of such assignment.

(b) The department shall screen treating physicians, other providers, and payors against the independent review organization and its physicians and other providers conducting independent review for potential conflicts of interest. The department shall have the discretion to determine whether conflicts exist.

(c) Independent review organizations shall be added to the list from which random assignments for independent review are made in order of the date of certification by the department.

(d) Random assignment shall be made chronologically from the list of independent review organizations with ultimate assignment to the first in line with no apparent conflicts of interest.

(e) An independent review organization assigned an independent review moves the independent review organization to the bottom of the list.

(f) Nonselection for presence of conflicts of interest does not move the independent review organization to the bottom of the list. Such independent review organization retains its chronological position until selected for independent review.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711340
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–6327

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Chapter 19. Agents Licensing

Subchapter R. Utilization Review Agents

28 TAC §§19.1702–19.1721

The Texas Department of Insurance proposes amendments to Chapter 19, concerning utilization review agents, by amending §§19.1702-19.1719 and adding new §§19.1720 and 19.1721. These amendments are necessary to implement provisions of the Insurance Code, Article 21.58A, which were added by Acts 1991, 72nd Legislature, Chapter 242, §11.03(a), relating to health care utilization review agents. The amendments are also necessary to address concerns that there be reasonable standards for conducting utilization reviews. In addition, the amendments are necessary to promote the consistent delivery of quality health care in a cost-effective manner by requiring utilization review agents to adhere to such standards when conducting reviews. Finally, the amendments are necessary to ensure an efficient and effective appeals process for the review of utilization review decisions. The new sections establish

specialty review utilization review agents and requirements for their licensing, and set forth the obligations of utilization review agents regarding requests for independent review by independent review organizations.

Various changes have been made to the sections to improve readability and update references. References throughout these sections to the Act as a source for the rules are deleted as unnecessary. The address of the Department of Insurance is updated throughout. Where new sections are proposed or sections are deleted, the remaining text is formatted to conform to these changes. References throughout these sections to Texas Civil Statutes, Article 6252-13a are replaced with citation to Government Code, Chapter 2001, §§2001.004, et seq.

Section 19.1702, subsections (b), (c)(2), and (c)(3)()B-D) are amended for clarification and readability.

Section 19.1703, amends the definition of "administrative procedure act," "appeal process," "complaint," "inquiry," "life-threatening," "practicing healthcare provider," and "registered utilization review agent." These terms are necessary to clarify the meaning of the amendments. The section also deletes the term "board," and redefines "emergency care," "open records law," and "provider of record" to make this section consistent with the amendments.

Section 19.1704, as amended, establishes a new address where applications for utilization review licensing must be submitted, requires that certain screening criteria requirements comply with the Act, and certain compensation arrangements be certified by an authorized representative of the company, requires establishment of procedures for handling both oral and written complaints by enrollees, patients, or health care providers, specifies that samples of utilization review materials submitted with applications must include language for notification of an adverse determination made in a utilization review, sets forth specific documentation to be submitted with all applications for utilization review licensure, and defines "material changes" for reporting purposes. Amendments to this section also clarify the timeframes in which the department must respond to applications and the timeframes and requirements for application of renewal by the utilization review agent. The proposal deletes Section 19.1704(h)-(i).

Section 19.1705, as amended, adds the requirement of input for development of a utilization review plan from "practicing health care providers that are both primary and specialty physicians," language "practicing health care providers in the areas of specialty which the utilization review agent reviews," and includes in the utilization review plan written procedures for identification of individuals with special circumstances or complex conditions who may require flexibility in the application of screening criteria through utilization review decisions. This section requires prior written notice to a physician or health care provider when publishing certain data which identifies a particular physician or health care provider. This section also sets forth certain criteria for utilization review decisions, and includes "dentist" and "health care provider" as an appropriate delegation for review from the utilization review agent under certain circumstances. Amendments to this section also provide that delegation of review to a hospital utilization review program does not relieve the utilization review agent of full responsibility for compliance with this subchapter. The proposal deletes Section 19.1705(2)(G) and (4).

Amendments to Section 19.1706 specify which information obtained by personnel from a physician, dentist or health care provider, must be obtained by specifically qualified personnel. Amendments to this section also provide that a physician directing utilization review for a utilization review agent may be employed by or under contract to the utilization review agent. A new paragraph (f) was added to §19.1708 prohibiting the observation of a psychotherapy session or access to mental health therapists' process or progress notes by a utilization review agent.

Amendments to Section 19.1710 add as a requirement of notification of adverse determination by a utilization review agent inclusion of the clinical basis for the determination. The amendments also provide that telephonic or electronic transmissions of notice where the patient is hospitalized be followed by a letter within three working days, that notice denying post-stabilization care subsequent to emergency treatment by given within the time appropriate to the circumstances, and that, for life-threatening conditions, the timeframes for notice set forth in subsection (e) of this section apply.

Amendments to Section 19.1712 provide that an adverse determination may be appealed orally or in writing, and require the utilization review agent to acknowledge receipt of the appeal within five days of its receipt. Amendments to this section also provide that dentists may, when appropriate, make appeal decisions, and impose a period of 15 working days for completion of specialty review. These amendments require that the utilization review agent maintain a method of expedited appeal for denials of care in life-threatening conditions, and require that utilization review agents issue response letters to patients explaining the resolution of the appeals. Amendments to this section also provide that in circumstances involving a life-threatening condition, there may be an immediate appeal to an independent review organization.

Amendments to Section 19.1713 require a utilization review agent to provide to the commissioner a written description of procedures for responding to requests for post-stabilization care subsequent to emergency treatment. Amendments to Section 19.1714 require that authorization for release of confidential information submitted by anyone other than the individual who is the subject of the information requested must contain the signature of such individual and be dated within the past year. The amendments also set forth requirements of a utilization review agent in responding to such requests, and permissible charges therefore. Finally, the amendments maintain that the commissioner is still entitled to such information from the utilization review agent upon request.

Amendments to Section 19.1716 add the requirements that the utilization review agent's summary report of written complaints must include the total number of written notices of adverse determinations, and set forth the specific requirements for listing appeals of adverse determinations in the summary report and the classifications of appellants. The amendments also require utilization review agents to respond to complaints within 30 days of their receipt.

Section 19.1717, as amended, includes the payor in the parties to be notified by the commissioner or the commissioner's designated representative of any alleged violations of the Act, and allows the commissioner to assess administrative penalties under the Insurance Code, Article 1.10E.

Section 19.1719, as amended, identifies HMOs and insurers performing utilization review under Section 14(g) and (h) of the Act as "registered utilization review agents." It also sets forth the specific portions of this subchapter to which health maintenance organizations and insurers performing utilization review under the Insurance Code, Article 21.58A, §14(g) will be subject, and requires that they submit written documentation to the department demonstrating compliance with all filing requirements required of utilization review agents. The amendments also include health maintenance organizations that contract with the Health and Human Services Commission or any agency operating part of the state Medicaid managed care program. The amendments also subject health maintenance organizations and insurers performing utilization review under the Insurance Code, Article 21.58A, §14(g) to assessment of maintenance taxes under the Insurance Code.

Proposed new Section 19.1720 establishes specialty utilization review agents and sets forth the requirements for their licensure, and standards for specialty review. Proposed new Section 19.1721 sets forth the obligations of utilization review agents for requesting and facilitating independent review by an independent review organization when requested.

Leah Rummel, deputy commissioner, HMO/URA group, has determined that the majority of the costs to comply with these proposed sections are the result of legislative enactment of Senate Bills 384 and 386, except as specifically enumerated. Ms. Rummel has also determined that for each year of the first five years the proposed sections are in effect, the fiscal impact on state government will be the cost to the Texas Department of Insurance associated with the development and operation of a computer system which allows a utilization review agent to request an independent review and to receive an assignment to an independent review organization. The department estimates the costs of the development and operation of such system will be $63,849. The department estimates that a maximum of 4400 independent reviews will be requested per year. In addition, the department estimates that the cost associated with notification of assignment to the patient and the patient's provider of record will be $.32 per notification, of $.64 per request for independent review. The total cost to the department for notification is estimated to be a maximum of $2816 per year. There will be no fiscal impact on local government as a result of enforcing or administering the proposed chapter. There will be no measurable effect on local employment or local economy.

Ms. Rummel has determined that for each year of the first five years the proposed sections are in effect, the public benefits anticipated as a result of the proposed sections will be a cost effective mechanism to assure greater access to necessary health care by consumers and to promote quality of care by providing independent review of issues of medical necessity. The proposed chapter enables those individuals who have received an adverse determination of medical necessity an additional review process on the question of medical necessity and the receipt of benefits from health insurers, health maintenance organizations and other managed care entities. This review will be an independent review performed by an entity with no relation to the payor of benefits and will ensure that requested reviews of adverse determinations are conducted fairly and impartially.

Ms. Rummel has determined that the majority of the costs to comply with these proposed sections are the result of legislative enactment of Senate Bills 384 and 386, except as specifically enumerated. Ms. Rummel estimates that for the first year that the proposed sections are in effect, the costs to the utilization review agents to access the computer system for requesting an independent review and receiving an assignment to an independent review organization will be a one time cost of $100 for a modem and $240 per year Internet provider fees, if such modem and Internet provider services are not already available. There are currently 241 licensed utilization review agents and 51 pending applications. The assumptions on which these costs are based may change substantially as the department receives data during the comment period. On the basis of cost per hour of labor, there is no anticipated difference in the cost of compliance between small and large businesses.

Comments on the proposal must be submitted within 30 days after publication of the proposed sections in the Texas Register to Caroline Scott, Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be submitted to Leah Rummel, Deputy Commissioner, HMO/URA Group, Mail Code 108-6A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any requests for a public hearing should be submitted separately to the Office of the Chief Clerk.

The amendments are proposed under the Insurance Code, Articles 21.58A and 1.03A. The Insurance Code, Article 21.58A provides that the department may promulgate such reasonable rules and regulations as are necessary and proper to carry out the provisions of the article. In addition, it provides that the department shall appoint an 11-member advisory committee to advise the department in developing such rules and regulations. The Insurance Code, Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance as authorized by statute. The Government Code, Chapter 2001, §§2001.004 et seq. authorizes and requires each state agency to adopt rules of practice setting forth the nature and requirement of available procedures and prescribes the procedures for adoption of rules by a state administrative agency.

The following articles are affected by this proposal: Article 21.58A and 21.58C

§19.1702. Limitations on Applicability.

(a) Except as noted in § 19.1719 of this title (relating to Responsibility of HMOs and Insurers Performing Utilization Review under the Insurance Code, Article 21.58A, §14(g) and (h)), all utilization review agents performing utilization reviews of services provided or proposed to be provided to an individual within the state on or after June 1, 1992, regardless of where the utilization review activities are physically based, must comply with this subchapter. All regulations in this subchapter shall relate to persons or entities subject to this subchapter.

(b)Insurers and HMOs are not required to obtain a certificate of registration, but must comply with §19.1719 of this subchapter. [(source: based upon the Act, §14(g)(h)(i))] However, an insurer or HMO which performs utilization review **on behalf of** [for] a person**, as defined in §19.1703 of this title (relating to Definitions),** other than the one for which it is the payor is required to obtain a certification of registration.

(c) **This subchapter does not affect the authority of the Texas Workers' Compensation Commission to exercise the powers granted to that commission under Title 5, Labor Code.**

(d) This subchapter does not apply to a utilization review agent or other person which conducts only the functions of categories of utilization review listed in paragraphs (1)-(3) of this subsection [(source: based upon the Act, §14(a)-(e))]:

(1) a person who provides information to enrollees about scope of coverage or benefits provided under a health insurance policy or health benefit plan and who does not determine whether particular health care services provided or to be provided to an enrollee are medically necessary or appropriate;

(2) a person**, as defined in §19.1703 of this title (relating to Definitions),** performing utilization review who is employed by, or under contract to, a certified utilization review agency;

(3) a utilization review agency which conducts only the categories of utilization review listed in subparagraphs **(A)-(D)** [(A)-(E)] of this paragraph:

(A) reviews performed pursuant to any contract with the federal government for utilization review of patients eligible for services under Title XVIII or XIX of the Social Security Act (42 United States Code §§1395 et seq. or §§1396 et seq.);

(B) reviews performed for the Texas Medicaid Program, **except reviews performed by a health maintenance organization that contracts with the Health and Human Services Commission or an agency operating part of the state Medicaid managed care program to provide health care services to recipients of medical assistance under Chapter 32, Human Resources Code;** the Chronically Ill and Disabled Children's Services Program created pursuant to Chapter 35, Health and Safety Code, any program administered under Title 2, the Human Resources Code, any program of the Texas Department of Mental Health and Mental Retardation, or any program of the Texas Department of Criminal Justice;

(C) [reviews of health care services provided to patients under the authority of the Texas Workers' Compensation Act (Texas Civil Statutes, §8308-1.01 et seq.);]

[(D)] reviews of health care services provided under a policy or contract of automobile insurance promulgated by the department under the Insurance Code, Subchapter A, Chapter 5 or issued pursuant to the Insurance Code, §1.14; **or**

(D) [(E)] reviews that apply to the terms and benefits of the employee welfare benefit plans as defined in Section **3(1)** [31(I)] of the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section **1002(1)** [1002]).

§19.1703. Definitions.

The following words and terms, when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise.

Act–Insurance Code, Article 21.58A, entitled "Health Care Utilization Review Agents."

Administrative Procedure Act–**Government Code, Chapter 2001**[Administrative Procedure and Texas Register Act (Texas Civil Statutes, Article 6252-13a)].

Administrator–A person holding a certificate of authority under the Insurance Code, Article 21.07-6.

Adverse determination–A determination by a utilization review agent that the health care services furnished or proposed to be furnished to a patient are not medically necessary or not appropriate [in the allocation of health care resources].

Appeal process –The formal process by which a utilization review agent offers a mechanism to address adverse determinations.

[Board–The State Board of Insurance]

Certificate–A certificate of registration granted by the **commissioner** [board] to a utilization review agent.

Commissioner–The commissioner of insurance.

Complaint –An oral or written expression of dissatisfaction with a utilization review agent concerning the utilization review agent's process. A complaint is not a misunderstanding or misinformation that is resolved promptly by supplying the appropriate information or clearing up the misunderstanding to the satisfaction of the enrollee.

Department–Texas Department of Insurance.

Dental plan–An insurance policy or health benefit plan, including a policy written by a company subject to the Insurance Code, Chapter 20, that provides coverage for expenses for dental services.

Dentist–A licensed doctor of dentistry, holding either a D.D.S. or a D.M.D. degree.

Emergency care–**Health care services provided in a hospital emergency facility or comparable facility to evaluate and stabilize medical conditions of a recent onset and severity, including but not limited to severe pain, that would lead a prudent layperson possessing an average knowledge of medicine and health to believe that his or her condition, sickness, or injury is of such a nature that failure to get immediate medical care could result in** [Bona fide emergency services provided after the sudden onset of a medical condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in]:

(A) placing the patient's health in serious jeopardy;

(B) serious impairment to bodily functions;[or]

(C) serious dysfunction of any bodily organ or part**;**[.]

(D) serious disfigurement; or

(E) in the case of a pregnant woman, serious jeopardy to the health of the fetus.

Enrollee–A person covered by a health insurance policy or **health benefit** plan. This term includes a person who is covered as an eligible dependent of another person.

Health benefit plan–A plan of benefits that defines the coverage provisions for health care for enrollees offered or provided by any organization, public or private, other than health insurance.

Health care provider–Any person, corporation, facility, or institution licensed by a state to provide or otherwise lawfully providing health care services that is eligible for independent reimbursement for those services.

Health insurance policy–An insurance policy, including a policy written by a company subject to the Insurance Code, Chapter 20, that provides coverage for medical or surgical expenses incurred as a result of accident or sickness.

Inquiry –A request for information or assistance from a utilization review agent.

Life-threatening –A disease or condition for which the likelihood of death is probable unless the course of the disease or condition is interrupted.

Nurse–A professional or registered nurse, a licensed vocational nurse, or a licensed practical nurse.

Open records law–**Government Code,** Chapter **552,** [424, Acts of the 63rd legislature, Regular Session, 1973 (Texas Civil Statutes, Article 6252-17a)]. Patient–An enrollee or an eligible dependent of the enrollee under a health benefit plan or health insurance plan.

Payor–An insurer writing health insurance policies; any preferred provider organization, health maintenance organization, self-insurance plan; or any other person or entity which provides, offers to provide, or administers hospital, outpatient, medical, or other health benefits to persons treated by a health care provider in this state pursuant to any policy, plan or contract.

Person–An individual, a corporation, a partnership, an association, a joint stock company, a trust, an unincorporated organization, any similar entity or any combination of the foregoing acting in concert.

Physician–A licensed doctor of medicine or a doctor of osteopathy.

Practicing healthcare provider–A health care provider who is engaged in diagnosing, treating, and/or offering to treat any mental or physical disease or disorder or any physical deformity or injury or performing such actions with respect to individual patients.

Provider of record–The physician or other health care provider that has primary responsibility for the care, treatment, and services rendered to the enrollee **or the physician or health care provider that is requesting or proposing to provide the care, treatment and services to the enrollee** and includes any health care facility when treatment is rendered on an inpatient or outpatient basis.

Screening criteria–The written policies, decision rules, medical protocols, or guides used by the utilization review agent as part of the utilization review process (e.g., appropriateness evaluation protocol (AEP) and intensity of service, severity of illness, discharge, and appropriateness screens (ISD-A)).

Utilization review–A system for prospective or concurrent review of the medical necessity and appropriateness of health care services being provided or proposed to be provided to an individual within the state. Utilization review shall not include elective requests for clarification of coverage.

Utilization review agent–An entity that conducts utilization review for an employer with employees in this state who are covered under a health benefit plan or health insurance policy**,**[;] a payor **,**[;] or an administrator.

Utilization review plan–The screening criteria and utilization review procedures of a utilization review agent.

Working day–A weekday, excluding New Years Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day.

§19.1704. Certification of Utilization Review Agents.

(a) An application for certification of a utilization review agent must be filed with the Texas Department of Insurance at the following address: Texas Department of Insurance, Mail Code **108-6A** [106-1G], P. O. Box 149104, Austin, TX 78714-9104.

(b) The application must be submitted on a form which can be obtained from the Utilization Review Section, Mail Code **108-6A** [106-1G], Texas Department of Insurance, 333 Guadalupe, P. O. Box 149104, Austin, TX 78714-9104.

(c) The attachments to the application form require the following information:

(1) a summary **description** of the utilization review plan which must include the matters listed in subparagraphs (A) and (B) of this paragraph. The utilization review plan must meet the requirements of §19.1705 of this subchapter (relating to General Standards of Utilization Review);

(A) an adequate summary description of screening criteria and review procedures to be used to determine medical necessity and appropriateness of health care; and

(B) **a certification, signed by an authorized representative of the company** [assurance] that screening criteria and review procedures to be applied in review determination are established with input from appropriate health care providers and approved by physicians;

(2) copies of procedures established for appeal of an adverse determination. These procedures must comply with the provisions of §19.1712 of this title (relating to Adverse Determinations of Utilization Review Agents);

(3) copies of procedures established for handling **oral or written**complaints by enrollees, patients, or health care providers. These procedures must comply with §19.1716 of this subchapter (relating to Complaints and Information);

(4) copies of policies and procedures which ensure that all applicable state and federal laws to protect the confidentiality of medical records are followed. These procedures must comply with §19.1714 of this title (relating to Confidentiality);

(5) a certification **signed by an authorized representative of the company** that the utilization review agent will comply with the provisions of the Act;

(6) a description of the categories of persons employed to perform utilization review;

(7) [copies of policies and procedures for orientation and training of personnel who perform utilization review who are not physicians, dentists, nurses, physicians assistants, registered records administrators, or accredited record technicians as addressed in §19.1706 of this subchapter (relating to Personnel);]

[(8)] a description of the hours of operation within the State of Texas and how the utilization review agent may be contacted during weekends and holidays. This description must be in compliance with §19.1713 of this subchapter (relating to Utilization Review Agent's Telephone Access);

(8) [9] representative samples of all materials provided by the utilization review agent/applicant to inform its clients, enrollees or providers of the requirements of the utilization review plan**. Samples shall include language for notification of an adverse determination made in a utilization review;**

(9) [(10)] a description of the basis by which the utilization review agent compensates its employees or agents to ensure compliance with paragraph **(10)** [(11)] of this subsection;

(10) [(11)] a certification **signed by an authorized representative** that the utilization review agent shall not permit or provide compensation or anything of value to its employees or agents, condition employment or its employee or agent evaluations, or set its employee or agent performance standards, based on the amount or volume of adverse determinations, reductions or limitations on lengths of stay, benefits, services, or charges or on the number or frequency of telephone calls or other contacts with health care providers or patients, which are inconsistent with the provisions of this subchapter [(source: subsection (c) is based upon the Act, §3(c))].

(11) the organizational information, documents and all amendments, including:

(A) the bylaws, rules and regulations, or any similar document regulating the conduct of the internal affairs of the applicant with a notarized certification bearing the original signature of an officer or authorized representative of the applicant that they are true, accurate, and complete copies of the originals;

(B) for an applicant that is publicly held, the name of each stockholder or owner of more than five percent of any stock or options;

(C) a chart showing the internal organizational structure of the applicant's management and administrative staff; and

(D) a chart showing contractual arrangements of the utilization review agent.

(12) the name and biographical information for each director, officer and executive of the applicant, and each person conducting utilization review.

(d) The utilization review agent shall report any material changes in the information in the application or renewal form referred to in this section, not later than the 30th day after the date on which the change takes effect. **Material changes include, but are not limited to, new personnel hired who are officers, directors and staff who perform utilization review; changes in the organizational structure; changes in contractual relationships and changes in the utilization review plan.** [(source: subsection (d) is based upon the Act, §3(g))]

(e) The application process is described in paragraphs (1)-(6) of this subsection.

(1) [The department shall have 30 days after receipt of an application to determine whether the application is complete. In the event that an application is found to be incomplete, the department will give the applicant written notice of the required information necessary to complete the application. If the application is complete, the applicant will be advised that the application has been received and accepted for review.]

[(2)] The department shall have 60 days **after receipt of an application** [from the date the application is determined to be complete pursuant to paragraph (1) of this subsection] to process the application and **to certify or deny** [approve or disapprove] it. The department shall give the applicant written notice of any **omissions or** deficiencies noted as a result of the review conducted pursuant to this paragraph.

[(3) The department shall afford the applicant an opportunity for a meeting to discuss any omissions or deficiencies noted.]

(2) [(4)] The applicant must correct the omissions or deficiencies in the application within 30 days of the date of the department's latest notice of such omissions or deficiencies. If the applicant fails to do so, the application file will be closed as an incomplete application. The application fee will not be refundable.

(3) [(5)] The applicant may waive any of the time limits described in this subsection, except in paragraph **(2)** [(4)]. The applicant may waive the time limit in paragraph (2) [(4)], of this subsection, only with the consent of the department.

(4) [(6)] The department shall maintain an application file which shall contain the application, notices of omissions or deficiencies, responses and any written materials generated by any person that was considered by the department in evaluating the application.

(f) A utilization review agent must apply for renewal of the certificate of registration every two years **from the date of certification**[,not later than March 1]. A renewal form must be used for this purpose. The renewal fee must be submitted with the renewal form. The renewal form can be obtained from the address listed in subsection (b) of this section. The completed renewal form, a summary of the current screening criteria, **a statement signed by an authorized representative of the company certifying that all information previously submitted is true and correct and all changes have been previously filed to the application certified by the department,** and the renewal fee must be submitted to the department at the address listed in subsection (a) of this section. A utilization review agent may continue to operate under its certificate of registration **if the information and the fee have been filed for renewal and** [after a completed renewal application form, a summary of the current screening criteria, and the renewal fee has been] timely received by the department, until the renewal is finally denied or issued by the department. If **the required information and fee** [a completed renewal application, a summary of the screening criteria, and fee] is not received prior to **the deadline for renewal of the certificate of registration** [March 1 of the year in which the certificate of registration must be renewed], the certificate of registration will automatically **expire** [be canceled] and the utilization review agent must complete and submit a new application form **and a new fee with all required information** [with a summary of the current screening criteria and the new application fee for another certificate of registration].

(g) If an application or renewal is initially denied under this section, the applicant or registrant may appeal such denial under the terms of the provisions of Chapter 1, Subchapter A

of this title (relating to Rules of Practice and Procedure) and **Government Code, Chapter 2001** [Texas Civil Statutes, Article 6252-13a, (Administrative Procedure and Texas Register Act)]. A hearing of such appeal shall be conducted within 45 days of the date the petition for such hearing is filed with the commissioner. A decision by the commissioner shall be rendered within 60 days of the date of the hearing.

(h) [Applications which are filed on or before December 31, 1992, will be processed on a first in, first out basis by the department. The timelines set out for processing applications in subsections (d) and (e) of this section, will not apply to these applications.

[(i) Entities which were operating in Texas as utilization review agents prior to June 1, 1992, must file the application described in subsections (a), (b) and (c), of this section, by June 1, 1992. Those entities may continue to operate as utilization review agents pending review of the application unless they are advised in writing that the application has been disapproved, or closed as an incomplete application as described in subsection (e) of this section. No entity may continue to operate after 15 days from the date of the notice of the denial or closure of the file.]

[(j)] An applicant for a certificate of registration as a utilization review agent must provide evidence that the applicant:

(1) has available the services of physicians, nurses, physician's assistants, **or other health care providers qualified to provide the service requested by the provider** [registered records administrators, accredited records technicians, or individuals who have received formal orientation and training in accordance with policies established by the utilization review agent and filed with the commissioner of insurance] to carry out its utilization review activities in a timely manner;

(2) meets any applicable provisions of these rules and regulations relating to the qualifications of the utilization review agents or the performance of utilization review;

(3) has policies and procedures which protect the confidentiality of medical records in accordance with applicable state and federal laws;

(4) **makes** [make] itself accessible to patients and providers 40 working hours a week during normal business hours in this state in each time zone in which it operates.

§19.1705. General Standards of Utilization Review.
The utilization review plan, including reconsideration and appeal requirements, shall be reviewed by a physician and conducted in accordance with standards developed with input from appropriate health care providers**, including practicing health care providers that are both primary and specialty physicians,**and approved by a physician. The utilization review plan shall include the following components:

(1) a description of the elements of review which the utilization review agent provides such as:

(A) prospective review:

(i) hospital admission;

(ii) procedures (such as surgical and non-surgical procedures);

(iii) courses of outpatient treatment;

(B) second surgical opinion;

(C) discharge planning;

(D) concurrent review;

(E) readmission review; and

(F) continued stay authorization;

(2) written procedures for:

(A) **identification of individuals with special circumstances or complex conditions who may require flexibility in the application of screening criteria through utilization review decisions; (B)** notification of the utilization review agent's determinations provided to the enrollee, a person acting on behalf of the enrollee, or the enrollee's provider of record as addressed in §19.1710 of this subchapter (relating to Notice of Determinations Made by Utilization Review Agents); **(C)** [(B)] appeal of an adverse determination and a copy of any forms used during the appeal process, as required by §19.1711 and §19.1712 of this subchapter (relating to Requirements Prior to Adverse Determination and Appeal of Adverse Determinations of Utilization Review Agents); **(D)** [(C)] receiving or redirecting a toll-free normal business hour and after-hour calls, either in person or by recording, and assurance that a toll-free number will be maintained 40 hours per week during normal business hours as addressed in §19.1713 of this subchapter (relating to Utilization Review Agent's Telephone Access); **(E)** [(D)] review including:

(i) any form used during the review process;

(ii) time frames that shall be met during the review; **(F)** [(E)] handling of **oral or** written complaints by enrollees, patients, or health care providers as addressed in subsection (a) of §19.1716 of this subchapter (relating to Complaints and Information); **(G)** [(F)] determining if physicians or other health care providers utilized by the utilization review agent are licensed, qualified, and appropriately trained;

[(G) orientation and training of personnel who perform utilization review, who are not physicians or dentists, nurses, physicians assistants, registered records administrators, or accredited records technicians;]

(H) assuring that patient-specific information obtained during the process of utilization review, as addressed in §19.1714 of this title (relating to Confidentiality), will be:

(i) kept confidential in accordance with applicable federal and state laws;

(ii) used solely for the purposes of utilization review, quality assurance, discharge planning, and catastrophic case management;

(iii) shared with only those agencies (such as the claims administrator) who have authority to receive such information; and

(iv) in the case of summary data shall not be considered confidential if it does not provide sufficient information to allow identification of individual patients;

(I) **providing prior written notice to a physician or health care provider when publishing data, including quality review studies or performance tracking data which identifies a particular physician or health care provider** [notifying health care

providers of any intended publication of quality review studies or performance tracking studies];

(3) screening criteria. Each utilization review agent shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from the physicians, including practicing physicians, **dentists**, and other health care providers. **Utilization review decisions shall be made in accordance with currently accepted medical or health care practices, taking into account special circumstances of each case that may require deviation from the norm stated in the screening criteria. Screening criteria must be objective, clinically valid, compatible with established principles of health care, and flexible enough to allow deviations from the norm when justified on a case-by-case basis. Screening criteria must be used to determine only whether to approve the requested treatment. Denials must be referred to an appropriate physician, dentist, or other health care provider to determine medical necessity.** Such written screening criteria and review procedures shall be available for review and inspection **to determine appropriateness and compliance as deemed necessary** by the commissioner or his or her designated representative and copying as necessary for the commissioner to carry out his or her lawful duties under the Insurance Code, provided, however, that any information obtained or acquired under the authority of these rules and the Act, is confidential and privileged and not subject to the open records law or subpoena except to the extent necessary for the [board or] commissioner to enforce these rules and the Act [(source: based upon the Act, §4(i))];

(4) [utilization review decisions. Utilization review decisions shall be made in accordance with accepted current medical criteria that are established, taking into account special circumstances of each case that may require a deviation from the norm stated in the medical criteria. Criteria must be objective, clinically valid, compatible with established principles of health care, and flexible enough to allow deviations from the norms when justified on a case-by-case basis. Screening criteria must be used only to determine whether to certify the requested treatment or to refer the request to the appropriate physician, dentist, or another health care provider to determine medical necessity;] [(5)] delegation of review. Provide circumstances, if any, under which the utilization review agent may delegate the review to a hospital utilization review program **or a health care provider. Such delegation shall not relieve the utilization review agent of full responsibility for compliance with this article, including the conduct of those to whom utilization review has been delegated.**
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§19.1706. Personnel

(a) Personnel employed by or under contract with the utilization review agent to perform utilization review shall be appropriately trained and qualified and if applicable, currently licensed. Personnel who obtain information **regarding a patient's specific medical condition, diagnosis and treatment options or protocols** directly from the physician, dentist or health care provider, either orally or in writing, and who are not physicians or dentists, shall be nurses, physicians assistants, **or health care providers qualified to provide the service requested by the provider** [registered records administrators, or accredited records technicians, who are either licensed or certified, or shall be individuals who have received formal orientation in accordance with policies and procedures established by the utilization review agent to assure compliance with this section, and a description of such policies and procedures shall be filed with the application referred to in §19.1704 of this subchapter (relating to Certification of Utilization Review Agents)]. This provision shall not be interpreted to require such qualifications for personnel who perform clerical or administrative tasks [(source: based upon the Act, §4(c))].

(b) A utilization review agent may not permit or provide compensation or any thing of value to its employees or agents, condition employment or its employee or agent evaluations, or set its employee or agent performance standards, based on the amount or volume of adverse determinations, reductions or limitations on lengths of stay, benefits, services, or charges or on the number or frequency of telephone calls or other contacts with health care providers or patients, which are inconsistent with the provisions of this subchapter [(source: based upon the Act, §4f))].

(c) The utilization review agent is required to provide the number, type, and minimum qualification or qualifications of the personnel either employed or under contract to perform the utilization review to the commissioner. Utilization review agents shall be required to adopt written procedures used to determine if physicians or other health care providers utilized by the utilization review agent are licensed, qualified, and appropriately trained, and must maintain records on such.

(d) Utilization review conducted by a utilization review agent shall be under the direction of a physician currently licensed to practice medicine by a state licensing agency in the United States. **Such physician may be employed by or under contract to the utilization review agent** [(source: the Act, §4(h))].

(e) Utilization review dental plans shall be reviewed by a dentist currently licensed by a state licensing agency in the United States.

§19.1707. Prohibitions of Certain Activities of Utilization Review Agents.

(a) A utilization review agent may not engage in unnecessary or unreasonably repetitive contacts with the health care provider or patient and shall base the frequency of contacts or reviews on the severity or complexity of the patient's condition or on necessary treatment and discharge planning activity [(source: the Act, §4(j))].

(b) A utilization review agent shall not set or impose any notice or other review procedures contrary to the requirements of the health insurance policy or health benefit plan [(source: the Act, §4(d))].

§19.1708. Utilization Review Agent Contact with and Receipt of Information from Health Care Providers.

(a) A health care provider may designate one or more individuals as the initial contact or contacts for utilization review agents seeking routine information or data. In no event shall the designation of such an individual or individuals preclude a utilization review agent or medical advisor from contacting a health care provider or others in his or her employ where a review might otherwise be unreasonably delayed or where the designated individual is unable to provide the necessary information or data requested by the utilization review agent [(source: the Act, §4(g))].

(b) Unless precluded or modified by contract, a utilization review agent shall reimburse health care providers for the reasonable costs for providing medical information in writing, including copying and transmitting any requested patient records or other documents. A health care provider's charge for providing medical information to

a utilization review agent shall not exceed the cost of copying set by rules of the Texas Workers Compensation Commission for records and may not include any costs that are otherwise recouped as a part of the charge for health care [(source: the Act, §4(l))].

(c) When conducting routine utilization review, the utilization review agent shall collect only the information necessary to certify the admission, procedure, or treatment and length of stay. This information may include identifying information about the patient and enrollee, the benefit plan, the treating health care provider, and facilities rendering care. It may also include clinical information regarding the diagnoses of the patient and the medical history of the patient relevant to the diagnoses; the patient's prognosis; and the treatment plan prescribed by the treating health care provider along with the provider's justification for the treatment plan. Second opinion information may also be required when applicable, sufficient to support benefit plan requirements. These items shall only be requested when relevant to the utilization review in question and be requested as appropriate from the beneficiary, plan sponsor, health care provider, or health care facility. The required information should be obtained from the appropriate source since no one source will have all of this information.

(1) Utilization review agents shall not routinely require hospitals and physicians to supply numerically codified diagnoses or procedures to be considered for certification. Utilization review agents may ask for such coding, since if it is known, its inclusion in the data collected increases the effectiveness of the communication.

(2) Utilization review agents shall not routinely request copies of medical records on all patients reviewed. During prospective and concurrent review, copies of medical records should only be required when a difficulty develops in certifying the medical necessity or appropriateness of the admission or extension of stay. In those cases, only the necessary or pertinent sections of the record should be required.

(d) Information in addition to that described in this section may be requested by the utilization review agent or voluntarily submitted by the health care provider, when there is significant lack of agreement between the utilization review agent and health care provider regarding the appropriateness of certification during the review or appeal process. "Significant lack of agreement" means that the utilization review agent:

(1) has tentatively determined, through its professional staff, that a service cannot be certified;

(2) has referred the case to a physician for review; and

(3) has talked to or attempted to talk to the health care provider for further information.

(e) The utilization review agent should share all clinical and demographic information on individual patients among its various divisions (e.g., certification, discharge planning, **case** [care] management) to avoid duplicate requests for information from enrollees or providers.

(f) Notwithstanding any other provision of this chapter, a utilization review agent may not require as a condition of treatment approval, or for any other reason, the observation of a psychotherapy session or the submission or review of a mental health therapist's process or progress notes. This does not preclude the utilization review agent from requiring submission of a patient's medical record.

§19.1709. On-Site Review by the Utilization Review Agent.

(a) Unless approved for an individual patient by the provider of record or modified by contract, a utilization review agent shall be prohibited from observing, participating in, or otherwise being present during a patient's examination, treatment, procedure or therapy. In no event shall this section otherwise be construed to limit or deny contact with a patient for purposes of conducting utilization review unless otherwise specifically prohibited by law [(source: the Act, §4(c))].

(b) Utilization review agents' staff shall identify themselves by name and by the name of their organization and, for on-site reviews, should carry picture identification and the utilization review company identification card with the certificate number assigned by the Texas Department of Insurance. Utilization review agents should assure that their on-site review staff register with the appropriate contact person, if available, prior to requesting any clinical information or assistance from hospital staff and wear appropriate hospital supplied identification tags while on the premises. Utilization review agents shall agree, if so requested, that the medical records remain available in the designated areas during the on-site review and that reasonable hospital administrative procedures shall be followed by on-site review staff so as to not disrupt hospital operations or patient care. Such procedures, however, should not obstruct or limit the ability of the utilization review agent to efficiently conduct the necessary review on behalf of the patient's health benefit plan.

§19.1710. Notice of Determinations Made by Utilization Review Agents. [(Source: the Act, §5))]

(a) A utilization review agent shall notify the enrollee, a person acting on behalf of the enrollee, or the enrollee's provider of record of a determination made in a utilization review.

(b) Except in the case of adverse determinations which are addressed in subsection **(d)** [(c)(2)] of this section, the notification required by this section must be mailed or otherwise transmitted not later than two working days after the date of the request for utilization review and all medical information necessary to substantiate the need for the treatment of service recommended is received by the agent.

(c) Notification of adverse determination by the utilization review agent must include:

(1) the principal reasons for the adverse determination;

(2) **the clinical basis for the adverse determination; (3)** a description or the source of the screening criteria that were utilized as guidelines in making the determination; and **(4)** [(3)] a description of the procedure for **the complaint and** appeal **process**.

(d) The adverse determination notification must be provided:

(1) within one working day by telephone or electronic transmission to the provider of record in the case of a patient who is hospitalized at the time of the adverse determination**, to be followed by a letter notifying the patient and the provider of record of an adverse determination within three working days;** [or]

(2) within three working days in writing to the provider of record and the patient if the patient is not hospitalized at the time of the adverse determination**; or**

(3) within the time appropriate to the circumstances relating to the delivery of the services and the condition of the patient, but in no case to exceed one hour from notification when denying post-stabilization care subsequent to emergency treatment as requested by a treating physician or provider. In such circumstances, notification shall be provided to the treating physician or health care provider.

(e) For life-threatening conditions, notification of adverse determination by the utilization review agent must be provided within the time frames addressed in subsection (d) of this section. At the time of notification of the adverse determination, the utilization review agent shall provide to the enrollee, person acting on behalf of the enrollee, and the enrollee's provider of record, the notification and the form prescribed by the commissioner.

§19.1711. Requirements Prior to Adverse Determination. [(Source: the Act, §4(k))]

Subject to the notice requirements of §19.1710 of this subchapter (relating to Notice of Determinations Made By Utilization Review Agents), in any instance where the utilization review agent is questioning the medical necessity or appropriateness of the health care services, the health care provider who ordered the services shall be afforded a reasonable opportunity to discuss the plan of treatment for the patient and the clinical basis for the utilization review agent's decision with a physician or, in the case of a dental plan with a dentist, prior to issuance of an adverse determination. The utilization review agent shall have written procedures describing how the opportunity is afforded.

§19.1712. Appeal of Adverse Determination of Utilization Review Agents. [(Source: the Act, §6)]

(a) A utilization review agent shall maintain and make available a written description of [an] appeal **procedures involving** [procedure of] an adverse determination.

(b) The procedures for appeals shall be reasonable and shall include the following:

(1) a provision that an enrollee, a person acting on behalf of the enrollee, or the enrollee's physician or health care provider may appeal the adverse determination **orally or in writing** [and shall be provided, on request, a clear and concise statement of the clinical basis for the adverse determination];

(2) **a provision that within five working days from receipt of the appeal the utilization review agent shall send to the appealing party a letter acknowledging the date of the utilization review agent's receipt of the appeal and include** a **reasonable** list of documents needed to be submitted by the appealing party to the utilization review agent for the appeal **. Such letter must also include provisions listed in this subsection. When the utilization review agent receives an oral appeal of adverse determination, the utilization review agent shall send a one-page appeal form to the appealing party;**

(3) a provision that appeal decisions shall be made by a physician, **or dentist, as appropriate,** provided that, if the appeal is denied and within 10 working days the health care provider sets forth in writing good cause for having a particular type of a specialty provider review the case, the denial shall be reviewed by a health care provider in the same or similar specialty as typically manages the medical **, dental, or specialty**condition, procedure, or treatment under discussion for review of the adverse determination**, and such specialty review shall be completed within 15 working days of receipt of the request;**

(4) in addition to the written appeal, a method for expedited appeal procedure for emergency care denials**, denials of care for life-threatening conditions,** and denials of continued stays for hospitalized patients**. Such procedure** [, which] shall include a **review by a** health care provider who has not previously reviewed the case[;] **who is of the same or a similar specialty as typically manages the medical condition, procedure, or treatment under review. The time in which** such appeal must be completed **shall be based on the medical or dental immediacy of the condition, procedure, or treatment, but may in no event exceed one working day from the date** [no later than one working day following the day on which the appeal, including] all information necessary to complete the appeal[,] is received [made to the utilization review agent]; [and]

(5) **a provision that after the utilization review agent has sought review of the appeal of the adverse determination, the utilization review agent shall issue a response letter to the patient, a person acting on behalf of the patient, or the patient's physician or health care provider explaining the resolution of the appeal. Such letter shall include:**

(A) a statement of the specific medical, dental, or contractual reasons for the resolution;

(B) the clinical basis for such decision;

(C) the specialization of any physician or other provider consulted; and

(D) notice of the appealing party's right to seek review of the denial by an independent review organization and the procedures for obtaining that review.

(6) written notification to the appealing party of the determination of the appeal, as soon as practical, but in no case later than 30 days after **the date the utilization review agent receives the appeal** [receiving all the required documentation of the appeal. If the appeal is denied, the written notification shall include the clinical basis for the appeal's denial and the specialty of the physician making the denial].

(c) In a circumstance involving an enrollee's life-threatening condition, the enrollee is entitled to an immediate appeal to an independent review organization and is not required to comply with procedures for an internal review of the utilization review agent's adverse determination.

§19.1713. Utilization Review Agent's Telephone Access. [(Source: the Act, §7)]

(a) A utilization review agent shall have appropriate personnel reasonably available by toll-free telephone at least 40 hours per week during normal business hours in both time zones in Texas, if applicable, to discuss patients' care and allow response to telephone review requests.

(b) A utilization review agent must have a telephone system capable of accepting or recording or providing instructions to incoming calls during other than normal business hours and shall respond to such calls not later than two working days of the later of the date on which the call was received or the date the details necessary to respond have been received from the caller.

(c) A utilization review agent must provide a written description to the commissioner setting forth the procedures to be used when responding to post-stabilization care subsequent to emergency treatment as requested by a treating physician or health care provider.

§19.1714. Confidentiality. [(Source: the Act, §8)]

(a) A utilization review agent shall preserve the confidentiality of individual medical records to the extent required by law.

(b) A utilization review agent may not disclose or publish individual medical records, **personal information,** or other confidential information about a patient obtained in the performance of utilization review without the prior written consent of the patient or as otherwise required by law. **If such authorization is submitted by anyone other than the individual who is the subject of the personal or confidential information requested, such authorization must:**

(1) be dated; and

(2) contain the signature of the individual who is the subject of the personal or confidential information requested. The signature must have been obtained one year or less prior to the date the disclosure is sought or the authorization is invalid.

(c) A utilization review agent may provide confidential information to a third party under contract or affiliated with the utilization review agent for the sole purpose of performing or assisting with utilization review. Information provided to third parties shall remain confidential.

(d) If an individual submits a written request to the utilization review agent for access to recorded personal information about the individual, the utilization review agent shall within 10 business days from the date such request is received:

(1) inform the individual submitting the request of the nature and substance of the recorded personal information in writing; and

(2) permit the individual to see and copy, in person, the recorded personal information pertaining to the individual or to obtain a copy of the recorded personal information by mail, at the discretion of the individual, unless the recorded personal information is in coded form, in which case an accurate translation in plain language shall be provided in writing.

(e) A utilization review agent's charges for providing a copy of recorded personal information to individuals shall not exceed ten cents per page and may not include any costs that are otherwise recouped as part of the charge for utilization review.

(f) [(c)] The utilization review agent may not publish data which identifies a particular physician or health care provider, including any quality review studies or performance tracking data without prior written notice to the involved **health care** provider. This prohibition does not apply to internal systems or reports used by the utilization review agent.

(g) [(d)] Documents in the custody of the utilization review agent that contain confidential patient information or physician or health care provider financial data shall be destroyed by a method which induces complete destruction of the information when the agent determines the information is no longer needed.

(h) [(e)] All patient, physician, and health care provider data shall be maintained by the utilization review agent in a confidential manner which prevents unauthorized disclosure to third parties. Nothing in this article shall be construed to allow a utilization review agent to take actions that violate a state or federal statute or regulation concerning confidentiality of patient records.

(i) [(f)] To assure confidentiality, a utilization review agent must, when contacting a physician's office or hospital, provide its certification number, the caller's name, and professional qualifications to the provider's named utilization review representative in the health care provider's office.

(j) [(g)] Upon request by the provider, the utilization review agent shall present written documentation that it is acting as an agent of the payor for the relevant patient.

(k) [(h)] The utilization review agent's procedures shall specify that specific information exchanged for the purpose of conducting **reviews** [review] will be considered confidential, be used by the private review agent solely for the purposes of utilization review, and shared by the utilization review agent with only those third parties who have authority to receive such information, such as the claim administrator. The utilization review agent's process shall specify that procedures are in place to assure confidentiality and that the utilization review agent agrees to abide by any federal and state laws governing the issue of confidentiality. Summary data which does not provide sufficient information to allow identification of individual patients or providers need not be considered confidential.

(l) [(i)] Medical records and patient specific information shall be maintained by the utilization review agent in a secure area with access limited to essential personnel only.

(m) [(j)] Information generated and obtained by the utilization review agents in the course of utilization review shall be retained for at least two years if the information relates to a case for which an adverse decision was made at any point or if the information relates to a case which may be reopened.

(n) Notwithstanding the provisions in subsections (a) through (m) of this section, the utilization review agent shall provide to the commissioner on request individual medical records or other confidential information for determination of compliance with this subchapter. The information is confidential and privileged and is not subject to the open records law, Government Code, Chapter 552, or to subpoena, except to the extent necessary to enable the commissioner to enforce this subchapter.

§19.1715. Retrospective Review of Medical Necessity. [(Source: the Act, §11)]

(a) When a retrospective review of the medical necessity and appropriateness of health care service is made under a health insurance policy or plan:

(1) such retrospective review shall be based on written screening criteria established and periodically updated with appropriate involvement from physicians, including practicing physicians, and other health care providers; and

(2) the payor's system for such retrospective review of medical necessity and appropriateness shall be under the direction of a physician.

(b) When an adverse determination is made under a health insurance policy or plan based on a retrospective review of the medical necessity and appropriateness of the allocation of health

care resources and services, the payor shall afford the health care providers the opportunity to appeal the determination in the same manner afforded the enrollee, with the enrollee's consent to act on his or her behalf, but in no event shall health care providers be precluded from appeal if the enrollee is not reasonably available or competent to consent. Such appeal shall not be construed to imply or confer on such health care providers any contract rights with respect to the enrollee's health insurance policy or plan that the health care provider does not otherwise have.

§19.1716. Complaints and Information.

(a) Utilization review agent's complaint system. [(source: based on the Act, §4(m))] A utilization review agent shall establish and maintain a complaint system that provides reasonable procedures for the resolution of **oral or** written complaints initiated by enrollees, patients, or health care providers concerning the utilization review and shall maintain records of such [written] complaints for **three** [two] years from the time the complaints are filed. The complaint procedure shall include a written response to the complainant by the agent within 30 [60] days.

(b) Utilization review agent's reporting requirements to the department. By March 1, of each year, the utilization review agent shall submit to the commissioner or his or her delegated representative, a summary report of all complaints at such times and in such form as the commissioner may require and shall permit the commissioner to examine the complaints and all relevant documents at any time. The summary report covers reviews performed by the utilization review agent during the preceding calendar year and includes:

(1) **the total number of written notices of adverse determinations;**

(2) a [summary of the resolved complaints] listing [the number] of **appeals of adverse determinations [complaints], by the medical condition that is the source of the dispute using primary ICD-9 (physical diagnosis) or DSM-IV (mental health diagnosis) code, and by the treatment in dispute, if any, using CPT (procedure) code or other relevant procedure code if a CPT designation is not available, or any other nationally recognized numerically codified diagnosis or procedure;**

(3) the classification of **appellant** [complainant](i.e., health care provider, enrollee, patient, etc.), [the type of complaints filed, and the complaint resolution];

(4) the subject matter of the appeal of the adverse determination. Appeal of adverse determinations shall be categorized as follows:

(A) benefit denial or limitation (e.g., treatment not pre-authorized, treatment not medically necessary, hospital stay not medically necessary, referral to specialty physician not provided);

(B) timely determinations (e.g., utilization review agent not responding to requests in a timely manner, appropriate personnel not available by telephone);

(C) screening criteria;

(5) the disposition of the appeal of adverse determination (either in favor of the appellant, or in favor of the original utilization review determination) at each level of the notification and appeal process;

(6) the number of referrals to an independent review organization, the name of the independent review organization, and the disposition of the review;

(7) the subject matter of the complaint. Complaint shall be categorized as follows:

(A) administration (e.g., copies of medical records not paid for, too many calls or written requests for information from provider, too much information requested from provider);

(B) qualifications of utilization review agent's personnel;

(C) appeal/complaint process (e.g., treating physician unable to discuss plan of treatment with utilization review physician, no notice of adverse determination, no notice of clinical basis for adverse determination, written procedures for appeal not provided).

[(2) a summary of the unresolved complaints listing the number of complaints, classification of complainant and a brief explanation of all complaints not resolved; and

[(3) a summary of appeals listing the number of appeals and the results of any appeals under adverse determinations procedures.]

(c) [(b)] Complaints to the department. Within a reasonable time period, upon receipt of a written complaint alleging a violation of this subchapter or the Act, by a utilization review agent, from an enrollee's health care provider, a person acting on behalf of the enrollee, or the enrollee, the commissioner or his or her delegated representative shall investigate the complaint**, notify the utilization review agent of the complaint, require response by the utilization review agent addressing the complaint within 10 days of receipt of the complaint,** and furnish a written response to the complainant and the utilization review agent named. The response will not identify in any manner, the patient or patients, without written consent. This response must include the following:

(1) a statement of the original complaint;

(2) a copy of any written response by the utilization review agent. The written response should not contain privileged medical records. If it is necessary to refer to medical records, they shall be separately forwarded with the response and clearly marked as privileged medical records;

(3) a statement of the findings of the commissioner or his or her delegated representative and an explanation of the basis of such findings;

(4) corrective actions, if any, on the part of the utilization review agent which the commissioner or his or her designated representative finds appropriate and whether the utilization review agent has voluntarily agreed to take such action;

(5) a time frame in which any corrective actions should be completed.

(d) [(c)] **Evidence of corrective action.** The utilization review agent will provide evidence of corrective action within the specified time frame to the commissioner or his or her representative.

(e) [(d)] Authority of the department to make inquiries. In addition to the authority of the commissioner to respond to complaints described in subsection (b) of this section, the department

is authorized to address inquiries to any utilization review agent in relation to the agents' business condition or any matter connected with its transactions which the department may deem necessary for the public good or for a proper discharge of its duties. It shall be the duty of the agent to promptly answer such inquiries in writing.

(f) [(e)] Lists of utilization review agents. The commissioner shall maintain and update monthly a list of utilization review agents issued certificates and the renewal date for those certificates. The commissioner shall provide the list at cost to all individuals or organizations requesting the list [(source: the Act, §12)].

(g) [(f)] On-site review by the Texas Department of Insurance.

(1) The commissioner or the commissioner's designated representative is authorized to make a complete on-site review of the operations of each utilization review agent at the principal place of business for such agent, as often as is deemed necessary.

(2) Utilization review agents will be notified of the scheduled on-site visit by letter, which will specify, as a minimum, the identity of the commissioner's designated representative and the expected arrival date and time.

(3) The utilization review agent must make available during such on-site visits all records relating to its operation.

(4) The commissioner or the designated representative may perform periodic telephone audits of utilization review agents authorized to conduct business in this state, to determine if the agents are reasonably accessible.

§19.1717. Administrative Violations. [(Source: Subsections (a)-(d) are based on he Act, §9)]

(a) If the commissioner through the commissioner's designated representative, believes that **any person or entity conducting utilization review pursuant to this article is in violation of** [a utilization review agent has violated or is violating] the Act **or applicable regulations**, the commissioner's designated representative shall notify the utilization review agent **, health maintenance organization, or insurer** of the alleged violation and may compel the production of any and all documents or other information **as necessary to determine whether or not such violation has taken place**.

(b) The commissioner's designated representative may initiate the proceedings under this section [after the 30th day after the date the commissioner's designated representative notifies the agent as required by Subsection (a) of this section].

(c) Proceedings under this **subchapter** [article] are a contested case for the **purpose of Government Code, Chapter 2001,** [Texas Civil Statutes, Article 6252-13a (Administrative Procedure and Texas Register Act.)]

(d) If[, after notice and hearing,] the commissioner determines that the utilization review agent**, health maintenance organization, insurer, or other person or entity conducting utilization review pursuant to this subchapter** has violated or is violating any provision of this Act, the commissioner may:

(1) impose sanctions under the Insurance Code, Article 1.10, §7; [or]

(2) issue a cease and desist order under the Insurance Code, Article 1.10A**; or** [.] **(3) assess administrative penalties under the Insurance Code, Article 1.10E.**

(e) If the utilization review agent has violated or is violating any provisions of the Insurance Code other than the Act, or applicable rules of the department, sanctions may be imposed under the Insurance Code, Article 1.10 or 1.10A.

(f) The commission of fraudulent or deceptive acts or omissions in obtaining, attempting to obtain, or use of certification as a utilization review agent shall be a violation of the Act.

§19.1718. Criminal Penalties.

Any person or entity performing utilization review without a certificate as required by the Act commits an offense. Except as otherwise provided by this section, an offense under this section is a Class A misdemeanor. If it is shown in the trial of a violation of this section that the person or entity has once before been convicted of a violation of this section, on conviction the person or entity shall be punished for a third degree felony. Each day of violation constitutes a separate offense. [(Sources: the Act, §10).]

§19.1719. Responsibility of HMOs and Insurers Performing Utilization Review Under the Insurance Code, Article 21.58A, §14, (g) and (h).

(a) **HMOs performing utilization review.** [HMOs performing utilization review under the Act, §14(g) must respond to the annual survey on utilization review distributed by the Texas Department of Insurance within 30 days of receipt of the survey, and comply with all of the following requirements of the Act:]

(1) HMOs performing utilization review under the Insurance Code, Article 21.58A, §14(g) shall be subject to §19.1701 of this subchapter (relating to General Provisions), §19.1702 of this subchapter (relating to Limitations on Applicability), §19.1703 of this subchapter(relating to Definitions), §19.1704(c) and (d) of this subchapter (relating to Certification of Utilization Review Agents), §19.1705 of this subchapter (relating to General Standards of Utilization Review), §19.1706 of this subchapter (relating to Personnel), §19.1707 of this subchapter (relating to Prohibitions of Certain Activities of Utilization Review Agents), §19.1708 of this subchapter (relating to Utilization Review Agent Contact with and Receipt of Information from Health Care Providers), §19.1709 of this subchapter (relating to On-Site Review by the Utilization Review Agent), §19.1710 of this subchapter (relating to Notice of Determinations Made by Utilization Review Agents), §19.1711 of this subchapter (relating to Requirements Prior to Adverse Determination), §19.1712 of this subchapter (relating to Appeal of Adverse Determination of Utilization Review Agents), §19.1713 of this subchapter (relating to Utilization Review Agent's Telephone Access), §19.1714 of this subchapter (relating to Confidentiality), §19.1715 of this subchapter (relating to Retrospective Review of Medical Necessity), §19.1716 of this subchapter (relating to Complaints and Information), §19.1717 of this subchapter (relating to Administrative Violations), §19.1720 of this subchapter (relating to Specialty Utilization Review Agent), and §19.1721 of this subchapter (relating to Independent Review of Adverse Determinations) with respect to their operations under the provisions of the Act, §14(g).

[(1) the utilization review plan, including reconsideration and appeal requirements, shall be reviewed by a physician and conducted in accordance with standards developed with input from appropriate health care providers and approved by a physician (source: the Act, §4(b)).

[(2) personnel employed by or under contract with HMOs performing utilization review shall be appropriately trained and qualified. Personnel who obtain information directly from the physician or dentist or health care provider, either orally or in writing, and who are not physicians or dentists shall be nurses, physicians assistants, registered records administrators, or accredited records technicians, who are either licensed or certified, or shall be individuals who have received formal orientation in accordance with policies and procedures established by the utilization review agent to assure compliance with this section, and a description of such policies and procedures shall be filed with the commissioner. This provision shall not be interpreted to require such qualifications for personnel who perform clerical or administrative tasks (source: Based upon the Act, §4(c));

[(3) unless approved for an individual patient by the provider of record or modified by contract, an HMO performing utilization review shall be prohibited from observing, participating in, or otherwise being present during a patient's examination, treatment, procedure or therapy. In no event shall this section otherwise be construed to limit or deny contact with a patient for purposes of conducting utilization review unless otherwise specifically prohibited by law (source: the Act, §4(e));

[(4) an HMO performing utilization review may not permit or provide compensation or any thing of value to its employees or agents, condition employment or its employee or agent evaluations, or set its employee or agent performance standards, based on the amount or volume of adverse determinations, reductions or limitations on lengths of stay, benefits, services, or charges or on the number or frequency of telephone calls or other contacts with health care providers or patients, which are inconsistent with the provisions of this subchapter (source: the Act, §4(f));

[(5) utilization review conducted by an HMO performing utilization review shall be under the direction of a physician licensed to practice medicine by a state licensing agency in the United States (source: the Act, §4(h));

[(6) utilization review dental plans shall be reviewed by a dentist currently licensed by a state licensing agency in the United States.

[(7) each HMO performing utilization review shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from the physicians, including practicing physicians, and other health care providers. Such written screening criteria and review procedures shall be available for review and inspection by the commissioner and copying as necessary for the commissioner to carry out his or her lawful duties under this code, provided, however, that any information obtained or acquired under the authority of this subsection and article is confidential and privileged and not subject to the open records law or subpoena except to the extent necessary for the board or commissioner to enforce the Act (source: the Act, §4(I)); and

[(8) unless precluded or modified by contract, an HMO performing utilization review shall reimburse health care providers for the reasonable costs for providing medical information in writing, including copying and transmitting any requested patient records or other documents. A health care provider's charge for providing medical information to a utilization review agent shall not exceed the cost of copying set by rules of the Texas Workers Compensation Commission for records and may not include any costs that are otherwise recouped as a part of the charge for health care (source: the Act, §4(l)).]

[(b) Nothing in the Act or this subchapter shall be construed to prohibit or limit the distribution of a proportion of the savings from the reduction or elimination of unnecessary medical services, treatment, supplies, confinements, or days of confinement in a health care facility through profit sharing, bonus, or withhold arrangements to participating physicians or participating health care providers for rendering health care services to enrollees [(source: based upon the Act, §14(g)(1)).

[(c) The complaint system established by §11.506(6) of this title (relating to Mandatory Provisions: Group and Non-Group Agreement and Group Certificate) shall be considered to be in compliance with this section so long as it provides for complaints for health care providers.

[(d) HMOs must submit to assessment of maintenance taxes under the Insurance Code, Article 20A.33, Texas Health Maintenance Organization Act, to cover the costs of administering compliance of health maintenance organizations under the Act (source: the Act, §14(g)(3)).]

(2) [(e)] When a health maintenance organization performs utilization review for a person or entity subject to this subchapter other than one for which it is the payor, such health maintenance organization shall be required to obtain a certificate under the Act, §3, and comply with all the provisions of the Act [source: the Act, §14(i))].

[(f) HMOs performing utilization review under the Insurance Code, Article 21.58A, §14, paragraph (g) will be subject to §19.1714 of this subchapter (relating to Confidentiality), §19.1716(b) of this subchapter (relating to Complaints and Information), and §19.1717 of this subchapter (relating to Administrative Violations), with respect to their operations under the provisions of the Act, §14(g) restated in subsection (a) of this section.]

(3) Health maintenance organizations performing utilization review under the Act, §14(g) must submit written documentation to the department demonstrating compliance with all filing requirements defined in §19.1704(c) and (d) of this title (relating to Certification of Utilization Review Agents).

(4) A health maintenance organization, including a health maintenance organization that contracts with the Health and Human Services Commission or an agency operating part of the state Medicaid managed care program to provide health care services to recipients of medical assistance under Chapter 32, Human Resources Code, is subject to this article.

(5) Health maintenance organizations must submit to assessment of maintenance taxes under the Insurance Code, Article 20A.33, to cover the costs of administering compliance of health maintenance organizations under the Act.

(b) Insurers performing utilization review.

(1) An insurer that delivers or issues for delivery a health insurance policy in Texas is subject to the Insurance Code, Article 21.58A and such insurer shall be subject to assessment of maintenance tax under the Insurance Code to cover the costs of administering compliance of insurers.

(2) Insurers performing utilization review under the Insurance Code, Article 21.58A, §14 (g) will be subject to §19.1701 of this subchapter (relating to General Provisions), §19.1702 of this subchapter (relating to Limitations on Applicability), §19.1703 of this subchapter (relating to Definitions), §19.1704(c) and (d) of this subchapter (relating to Certification of Utilization Review Agents), §19.1705 of this subchapter (relating to General Standards of Utilization Review), §19.1706 of this subchapter (relating to Personnel), §19.1707 of this subchapter (relating to Prohibitions of Certain Activities of Utilization Review Agents), §19.1708 of this subchapter (relating to Utilization Review Agent Contact with and Receipt of Information from Health Care Providers), §19.1709 of this subchapter (relating to On-Site Review by the Utilization Review Agent), §19.1710 of this subchapter (relating to Notice of Determinations Made by Utilization Review Agents), §19.1711 of this subchapter (relating to Requirements Prior to Adverse Determination), §19.1712 of this subchapter (relating to Appeal of Adverse Determination of Utilization Review Agents), §19.1713 of this subchapter (relating to Utilization Review Agent's Telephone Access), §19.1714 of this subchapter (relating to Confidentiality), §19.1715 of this subchapter (relating to Retrospective Review of Medical Necessity), §19.1716 of this subchapter (relating to Complaint and Information), §19.1717 of this subchapter (relating to Administrative Violations), §19.1720 of this subchapter (relating to Specialty Utilization Review Agent), and §19.1721 of this subchapter (relating to Independent Review of Adverse Determinations) with respect to their operations under the provisions of the Act, §14(h).

(3) When an insurer performs utilization review for a person or entity subject to this subchapter other than one for which it is the payor, such insurer shall be required to obtain a certificate under the Act, §3, and comply with all the provisions of the Act.

(4) Insurers performing utilization review under the Act, §14(h) must submit written documentation to the department demonstrating compliance with all the filing requirements defined in §19.1704(c) and (d) of this title (relating to Certification of Utilization Review Agents).

[(g) Insurers performing utilization review under the Act, §14(h) must comply with the requirements of paragraphs (1)-(14) of this subsection.

[(1) The utilization review plan, including reconsideration and appeal requirements, shall be reviewed by a physician and conducted in accordance with standards developed with input from appropriate health care providers and approved by a physician. (source: the Act, §4(b)).

[(2) Personnel employed by or under contract with insurers performing utilization review shall be appropriately trained and qualified. Personnel who obtain information directly from the physicians, dentists, or health care providers, either orally or in writing, and who are not physicians or dentists shall be nurses, physician assistants, registered records administrators, or accredited records technicians, who are either licensed or certified, or shall be individuals who have received formal orientation and training in accordance with policies and procedures established by the insurer to assure compliance with this section, and a description of such policies and procedures shall be filed with the department. This provision shall not be interpreted to require such qualifications for personnel who perform clerical or administrative tasks (source: based upon the Act, §4(c)).

[(3) An insurer performing utilization review shall not set or impose any notice or other review procedures contrary to the requirements of the health insurance policy or health benefit procedures contrary to the requirements of the health insurance policy or health benefit plan. (source: the Act, §4(d)).

[(4) Unless approved for an individual patient by the provider of record, or modified by contract, an insurer performing utilization review shall be prohibited from observing, participating in, or otherwise being present during a patient's examination, treatment, procedures, or therapy. (source: the Act, §4(e)).

[(5) An insurer performing utilization review may not permit or provide compensation or any thing of value to its employees or agents, condition employment or its employee or agent evaluations, or set its employee or agent performance standards, based on the amount or volume of adverse determinations, reductions or limitations on lengths of stay, benefits, services, or charges or on the number of frequency of telephone calls or other contacts with health care providers or patients, which are inconsistent with the provisions of the Act. (source: the Act, §4(f)).

[(6) A health care provider may designate one or more individuals as the initial contact or contacts for insurers performing utilization review seeking routine information or data. In no event shall the designation of such an individual or individuals preclude a utilization review agent or medical advisor from contacting a health care provider or others in his or her employ where a review might otherwise be unreasonably delayed or where the designated individual is unable to provide the necessary information or data requested by the insurer performing utilization review. (source: the Act, §4(g)).

[(7) Utilization review conducted by an insurer performing utilization review shall be under the direction of a physician licensed to practice medicine by a state licensing agency in the United States. (source: the Act, §4(h)).

[(8) Each insurer performing utilization review shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from physicians, including practicing physicians, and other health care providers. Such written screening criteria and review procedures shall be available for review and inspection by the commissioner and copying as necessary for the commissioner to carry out his or her lawful duties under the Act, provided, however, that any information obtained or acquired under the authority of this subsection and the Act is confidential and privileged and not subject to the open records law or subpoena except to the extent necessary for the board or commissioner to enforce the Act. (source: the Act, §4(i)).

[(9) An insurer performing utilization review may not engage in unnecessary or unreasonable repetitive contacts with the health care provider or patient and shall base the frequency of contacts or reviews on the severity or complexity of the patient's condition or on necessary treatment and discharge planning activity. (source: the Act, §4(j)).

[(10) Subject to the notice requirements of §5 of the Act, in any instance where the insurer performing utilization review is questioning the medical necessity or appropriateness of health care services, the health care provider who ordered the services shall be

afforded a reasonable opportunity to discuss the plan of treatment for the patient and the clinical basis for the insurer's decision with a physician or, in the case of a dental plan with a dentist, prior to issuance of an adverse determination (source: based upon the Act, §4(k)).

[(11) Unless precluded or modified by contract, an insurer performing utilization review shall reimburse health care providers for the reasonable costs for providing medical information in writing, including copying and transmitting any requested patient records or other documents. A health care provider's charges for providing medical information to an insurer performing utilization review shall not exceed the cost of copying set by rule of the Texas Worker's Compensation Commission for records and may not include any costs that are otherwise recouped as a part of the charge for health care. (source: the Act, §4(l)).

[(12) An insurer performing utilization review shall establish and maintain a complaint system that provides reasonable procedures for the resolution of written complaints initiated by enrollees, patients, or health care providers concerning the utilization review and shall maintain records of such written complaints for two years from the time the complaints are filed. The complaint procedure shall include a written response to the complainant by the agent within 60 days. The insurer performing utilization review shall submit to the commissioner a summary report of all complaints at such times and in such form as the board may require and shall permit the commissioner to examine the complaints and all relevant documents at any time. (source: the Act, §4(m)).

[(13) The insurer performing utilization review may delegate utilization review to qualified personnel in the hospital or health care facility where the health care services were or are to be provided. (source: the Act, §4(n)).

[(14) Insurers performing utilization review must comply with clauses (A) - (E) of this paragraph.

[(A) Insurers must respond to the annual survey on utilization review distributed by the Texas Department of Insurance within 30 days of receipt of the survey.

[(B) Insurers must comply with all the requirements of the Act, §8 restated in §19.1714 of this subchapter (relating to Confidentiality).

[(C) When an insurer performs utilization review for a person or entity subject to this article other than one for which it is the payor, such insurer shall be required to obtain a certificate under the Act, §3, and comply with all the provisions of the Act. (source: the Act, §14(i)).

[(D) Insurers performing utilization review under, the Act, §14(h), will be subject to §19.1714 of this subchapter (relating to Confidentiality), subsection (b) of §19.1716 of this subchapter (relating to Complaints and Information) and §19.1717 of this subchapter (relating to Administrative Violations), with respect to their operations under the provision of the Act, §14(h), restated in subsection (g) of this section.

[(E) insurers performing utilization review under the Act, §14(g) and (h), must furnish the information listed in clauses (i)- (iii) of this subparagraph to the Utilization Review Department of the Texas Department of Insurance:

[(i) complete name;

[(ii) principal locality in which utilization review is being performed; and

[(iii) complete address, including contact person.]

§19.1720. Specialty Utilization Review Agent.

(a) A utilization review agent that solely performs specialty review under the Insurance Code, Article 21.58A, §14(j) is subject to the Act, except for the Insurance Code, Article 21.58A, §4(b), (c), (h) or (k) or §6(b)(3) of the Act. A utilization review agent that does not solely perform specialty review, is not subject to the provisions of this section or the Insurance Code, Article 21.58A, §14(j).

(b) A utilization review agent that performs specialty review under the Insurance Code, Article 21.58A, §14 (j) is subject to this subchapter, except §19.1704 (c)(1)(B); (c)(6); (j)(1) of this title (relating to Certification of Utilization Review Agents); §19.1705 of this title (relating to General Standards of Utilization Review); and §19.1706 (a), (d), (e) of this title (relating to Personnel); §19.1711 of this title (relating to Requirements Prior to Adverse Determination) and §19.1712 (b)(3) of this title (relating to Appeal of Adverse Determination of Utilization Review Agents).

(c) A specialty utilization review agent must submit by attachment to the application assurance that the utilization review plan, including reconsideration and appeal requirements, shall be reviewed by a health care provider of the appropriate specialty and conducted in accordance with standards developed with input from a health care provider of the appropriate specialty.

(d) A specialty utilization review agent must submit by attachment to the application a description of the categories of personnel who perform utilization review, such as physicians, dentists, nurses, physicians assistants, or other health care providers of the same specialty as the utilization review agent and who are licensed or otherwise authorized to provide the specialty health care service by a state licensing agency in the United States, except that this provision does not require those qualifications from personnel who perform solely clerical or administrative tasks.

(e) An applicant for a certificate of registration as a specialty utilization review agent must provide evidence that the applicant has available the services of physicians, dentists, nurses, physician's assistants, or other health care providers of the same specialty as the utilization review agent and who are licensed or otherwise authorized to provide the specialty health care service by a state licensing agency in the United States to carry out its utilization review activities in a timely manner.

(f) Personnel employed by or under contract with the specialty utilization review agent to perform utilization review shall be appropriately trained and qualified and, if applicable, currently licensed. Personnel who obtain information regarding a patient's specific medical condition, diagnosis, and treatment options or protocols directly from the physician, dentist or health care provider, either orally or in writing, and who are not physicians or dentists, shall be nurses, physician's assistants, or other health care providers of the same specialty as the utilization review agent and who are licensed or otherwise authorized to provide the specialty health care service by a state licensing agency in the United States. This provision shall not be interpreted to require such qualifications for personnel who perform clerical or administrative tasks.

(g) Utilization review conducted by a specialty utilization review agent shall be conducted under the direction of a health care

provider of the same specialty and shall be licensed or otherwise authorized to provide the specialty health care service by a state licensing agency in the United States.

(h) Subject to the notice requirements of §19.1712 of this subchapter (relating to Appeal of Adverse Determination), in any instance where the specialty utilization review agent questions the medical necessity or appropriateness of health care services, the health care provider who ordered the services shall, prior to the issuance of an adverse determination, be afforded a reasonable opportunity to discuss the plan of treatment for the patient and the clinical basis for the decision of the utilization review agent with a health care provider of the same specialty as the utilization review agent.

(i) An appeal decision shall be made by a physician or health care provider in the same or a similar specialty as typically manages the medical, dental or specialty condition, procedure, or treatment which is the subject of the adverse determination under review. The specialty review must be completed within 15 working days of receipt of the request.

§19.1721. Independent Review of Adverse Determinations.

(a) For life-threatening conditions, notification of adverse determination by the utilization review agent must be provided within the time frames addressed in §19.1710(d) of this subchapter (relating to Notice of Determinations Made by Utilization Review Agents). At the time of notification of the adverse determination, the utilization review agent shall provide to the enrollee, person acting on behalf of the enrollee, and the enrollee's provider of record, the notification and the form prescribed by the commissioner. Such notification shall describe how to obtain independent review of such determination and how the department assigns a request for review to an independent review organization, and include the form requesting enrollee information.

(b) The enrollee, person acting on behalf of the enrollee, or the enrollee's provider of record shall determine the existence of a life-threatening condition on the basis that a prudent layperson possessing an average knowledge of medicine and health would believe that his or her disease or condition is a life-threatening condition.

(c) A utilization review agent shall permit any party whose appeal of an adverse determination is denied by the utilization review agent to seek review of that determination by an independent review organization assigned to the appeal in accordance with Insurance Code, Article 21.58C as follows:

(1) the utilization review agent shall provide a notification prescribed by the commissioner to the enrollee or the person acting on behalf of the enrollee and the enrollee's provider of record, on how to appeal the denial of an internal appeal to an independent review organization. The notification shall describe how to obtain independent review of such determination and how the department assigns a request for review to an independent review organization, and include the form requesting enrollee information.

(2) the utilization review agent shall provide the notification and the form prescribed by the commissioner to the enrollee or the person acting on behalf of the enrollee and the enrollee's provider of record at the time of denial of the appeal;

(3) the form prescribed by the commissioner shall be completed by the enrollee, person acting on behalf of the enrollee or the enrollee's provider of record and returned to the utilization review agent to begin the independent review process. The form prescribed by the commissioner authorizing release of medical information to the independent review organization must be signed by the enrollee or the enrollee's legal guardian.

(d) The utilization review agent shall notify the department upon receipt of the request for an independent review.

(e) The utilization review agent shall provide information contained in the form prescribed by the commissioner to the department. The notification and information shall be submitted via modem or, in the event that modem is unavailable, through facsimile.

(f) The utilization review agent may access the department on working days, between 7 AM and 6 PM Central time, Monday through Friday, to obtain assignment of an independent review organization.

(g) The department shall, within one working day of receipt of the request, randomly assign an independent review organization and notify the utilization review agent and the independent review organization of the assignment. The department shall send notification to the enrollee or person acting on behalf of the enrollee and the enrollee's provider of record no later than one working day after the assignment has been made.

(h) Not later than the third working day after the date that the utilization review agent receives a request for review, the utilization review agent shall provide to the assigned independent review organization a copy of:

(1) any medical records of the enrollee in the possession of the utilization review agent that are relevant to the review;

(2) any documents used by the plan in making the determinations to be reviewed by the organization;

(3) the written notification described by §19.1712(b)(6) of this subchapter (relating to Appeal of Adverse Determination of Utilization Review Agents);

(4) any documentation and written information submitted to the utilization review agent in support of the appeal; and

(5) a list containing the name, address and phone number of each physician or health care provider who has provided care to the enrollee and who may have medical records relevant to the appeal.

(i) The utilization review agent shall comply with the independent review organization's determination with respect to the medical necessity or appropriateness of health care items and services for an enrollee.

(j) The utilization review agent shall pay for the independent review.

(k) The utilization review agent may recover costs associated with the independent review from the payor.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711328
Caroline Scott
General Counsel and Chief Clerk

Texas Department of Insurance
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–6327

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Part II. Texas Workers' Compensation Commission

Chapter 126. General Provisions Applicable to all Benefits

28 TAC §126.5, §126.6

The Texas Workers' Compensation Commission (the Commission) proposes amendments to §126.5, concerning Procedure for Requesting Required Medical Examinations and §126.6, concerning Order for Required Medical Examinations. The amendments are proposed to reflect changes to the procedure for obtaining a required medical examination which are contained in amendments to the Texas Labor Code, §408.004.

Recent legislation (House Bill 3161, 75th legislature, 1997) amended the Texas Labor Code, §408.004 to allow the Commission to adopt rules that require an injured employee to submit to not more than three medical examinations in a 180-day period under specified circumstances, including to determine whether there has been a change in the injured employee's condition, whether it is necessary to change the injured employee's diagnosis, and whether treatment should be extended to another body part or system. Prior to this amendment, an insurance carrier was entitled to an examination of the injured employee only once in a 180-day period. This legislation also requires the Commission to establish a monitoring system by rule and provides an administrative violation if the insurance carrier unreasonably requests additional required medical examinations. The amendments to §126.5 and §126.6 are proposed in response to this change and to clarify some related minor administrative issues.

The proposed amendment to §126.5(a) deletes the list of information to be included on the form for requesting a required medical examination, updates the citation to the Texas Workers' Compensation Act (the Act) and clarifies the rule language. The information contained in a request form need not be specified by rule.

The proposed amendment to §126.5(b) clarifies that the concurrence and permission (agreement) of the injured employee is to be obtained by the insurance carrier and requires the insurance carrier to report the agreement or failure to reach an agreement to the Commission. To be able to enforce the number of required medical examinations that are granted in a 180-day period, the Commission must be informed of all of the examinations. These changes provide a mechanism to notify the Commission of required medical examinations that are performed with the agreement of the injured employee as opposed to examination performed as a result of an order from the Commission. Currently, the Commission receives no notice of required medical examinations that are conducted as a result of an agreement between the parties.

The proposed amendment to §126.5(c) updates the citation to the Act and reflects the allowance for certain additional examinations.

The proposed amendment to §126.5(d) lists the reasons that the Commission may require an injured employee to submit to an additional required medical examination within a 180-day period. These reasons include the three required by the Act in addition to the other reasons that an additional required medical examination may be granted. Because the statute clearly allows a required medical examination for the purpose of determining whether or not maximum medical improvement (MMI) has been reached, this language has been deleted from this subsection.

Proposed new subsection (e) is added to §126.5 to prohibit an insurance carrier from requesting additional examinations before the carrier has obtained approval for the originally requested examination and from submitting multiple requests based on the same reason or rationale. An exception to this prohibition is included in the proposal for a request for an examination that requires a doctor of a different medical specialty to render an opinion on maximum medical improvement or the impairment rating.

Proposed new subsection (f) is added to §126.5 to clearly limit an insurance carrier to no more than three medical examinations within any 180 consecutive day period. Proposed new subsection (g) requires the Commission to monitor insurance carrier requests for medical examinations. Proposed new subsection (h) sets out what constitutes an unreasonable request for an additional required medical examination and new subsection (i) sets out the potential administrative violations.

The proposed amendment to subsection 126.5(a) deletes the requirement that an agreement between the parties for an RME be in writing and the proposed amendment to subsection (b) clarifies that it is the injured employee's responsibility to reschedule an appointment prior to the date the examination was to occur. The proposed amendment to §126.6(c) clarifies that the injured employee's *treating* doctor may attend a required medical examination (as outlined in §134.5 of this title, relating to Treating Doctor Attendance at Medical Examination Under A Medical Examination Order) to eliminate any confusion between the language of the different rules. The proposed amendment adds a new subsection (d) to address the situations where the insurance carrier's required medical examination doctor refuses to allow the treating doctor to attend the examination. The proposed amendment to subsection (e) (currently subsection (d)) defines the submission of reports by the required medical examination doctor and requires the report to be submitted to the treating doctor in addition to the other parties. The proposed amendment to subsection (g) (currently subsection (f)) clarifies that designated doctor examinations and spinal surgery second opinion examinations are not considered required medical examinations under this section. The proposed amendment to subsection (h) (currently subsection (g)) provides that if the required medical examination doctor refuses to allow the treating doctor to attend the examination, the injured employee would not be subject to an administrative violation for failure to submit to the examination. The amendment to subsection (i) (currently subsection (h)) clarifies that the insurance carrier is liable for the reasonable expenses incurred by the injured employee as a result of the required medical ex-

amination. Other proposed changes to §126.6 update citations to the Act to reflect codification of the Act in the Texas Labor Code and make the language consistent throughout the section.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the proposed rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Ms. Chamness also has determined that for each year of the first five years the rules are in effect the public benefit anticipated will include the ability of an insurance carrier to secure additional required medical examinations under specified conditions. These changes may allow certain disputes to be resolved in an expeditious fashion by securing additional medical opinions on the specific issues. The injured employee will benefit from the amendments to the rules by clearly being allowed to have their treating doctor attend the examination and the injured employee will not be subject to a potential administrative violation if the insurance carrier's selected doctor refuses to allow the treating doctor to attend. There does not appear to be any anticipated economic costs to persons who are required to comply with the rule as proposed. There will be no difference in the costs of compliance for small businesses as compared to large businesses.

Comments on the proposal or requests for public hearing must be received by 5:00 p.m. on Wednesday, October 8, 1997, and should be submitted to Elaine Crease, Office of the General Counsel, Mail Stop #4D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491. A public hearing will be scheduled for a later date.

The amendments are proposed under the Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; the Texas Labor Code, §408.004, which sets out when the Commission may require an injured employee to submit to medical examinations and specifically provides for the adoption of rules regarding the process for such examinations; the Texas Labor Code, §408.022, which provides for the injured employees' selection of treating doctor; the Texas Labor Code §408.122, which establishes a claimant's eligibility for impairment income benefits and the process by which a doctor designated by the Commission will settle disputes regarding whether a claimant has reached maximum medical improvement; and the Texas Labor Code §408.125, which establishes the process by which a doctor designated by the Commission will settle disputes regarding impairment ratings.

These proposed amendments affect the following statutes: the Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; the Texas Labor Code, §408.004, which sets out when the Commission may require an injured employee to submit to medical examinations and specifically provides for the adoption of rules regarding the process for such examinations; the Texas Labor Code, §408.022, which provides for the injured employees' selection of treating doctor; the Texas Labor Code §408.122, which establishes a claimant's eligibility for impairment income benefits and the process by which a doctor designated by the Commission will settle disputes regarding whether a claimant has reached maximum medical improvement; and the Texas Labor Code §408.125, which establishes the process by which a doctor designated by the Commission will settle disputes regarding impairment ratings.

§126.5. Procedure for Requesting Required Medical Examinations.

(a) The commission may authorize a **required** medical examination for any reason set forth in the **Texas Workers' Compensation** Act **(the Act)**, [§4.16] **Texas Labor Code §408.004** whether **the request for the examination is** made by the carrier or a division of the commission [shall be made on a form TWCC-22 approved by the commission, and shall be signed, and shall include the following information:] **. The request shall be made in the form and manner prescribed by the Commission.**

[(1) the worker's compensation number assigned to the claim by the commission;]

[(2) the employee's name, address, and social security number;]

[(3) the date and nature of the injury;]

[(4) the employer's name and address;]

[(5) a statement that the carrier or a division of the commission attempted to seek the employee's concurrence and permission for the examination and failed;]

[(6) the name, business address, specialty certification, and telephone number of the doctor selected by the requestor who has agreed to conduct the examination and any reason supporting a change of the carrier's selected doctor;]

[(7) a statement that all examinations ordered must be scheduled as soon as possible with at least 10 days notice to the claimant or his representative;]

[(8) the specific purposes of the examination;]

[(9) a statement that the requestor sent a copy of the request to the employee or the employee's representative;]

[(10) a statement that the carrier will pay reasonable expenses incident to the employee in submitting to such examination; and]

[(11) if the request is submitted by a carrier, a statement that the employee has not been examined by the carrier's choice of doctor within the last 180 days.]

(b) The commission shall not require an **injured** employee to submit to a medical examination **at the insurance carrier's request** until the [requestor] **insurance carrier** has made an attempt to **obtain the agreement** [receive the permission and concurrence] of the **injured** employee for the examination [at a specific time and place]. **The insurance carrier shall notify the commission in the form and manner prescribed by the commission about any agreement or non-agreement of the injured employee regarding the requested examinations. If an agreement is secured for an additional required medical examination within a 180-day period pursuant to subsections (d) and (e) of this section, the written notification must also include an explanation of why good cause exists for the additional required medical examination.**

(c) An insurance carrier's request for a medical examination order shall be delivered to the [local] commission office managing the claim, and be sent **by certified mail** to the **injured** employee, or

the employee's representative on the same day [by certified mail]. A carrier is entitled to only one required medical examination, [under] **as allowed by** the Act, §**408.004** [4.16], every 180 days**, except as permitted in subsections (d) and (e) of this section.**

(d) [The commission or the carrier may request an injured employee to submit to a medical examination to evaluate whether maximum medical improvement (MMI) has been reached.] **For dates of injury on or after September 1, 1997, the commission may approve additional required medical examinations at the insurance carrier's request before the expiration of 180 days in the event that a medical opinion is needed to determine if:**

(1) there has been a change in the injured employee's condition;

(2) there is a need to change the injured employee's diagnosis;

(3) the treatment should be extended to another body part or system, or if the extent of injury has changed;

(4) the compensable injury is a producing cause of additional problems or conditions;

(5) disability exists, because of newly discovered information;

(6) proposed surgery, other than spinal surgery, is necessary to treat the compensable injury; or

(7) the injured employee has reached maximum medical improvement and for the assignment of an impairment rating when the examination relates to a body part or system that is outside the expertise of the insurance carrier's required medical examination doctor selected under subsection (c) of this section.

(e) Except for the reason listed in subsection (d)(7) of this section, any request by an insurance carrier for an additional required medical examination shall be submitted only after the insurance carrier has previously had an examination under subsection (c)of this section. Unless good cause exists, a request for an additional required medical examination under subsection (d) of this section will not be approved during a 180 day period for the same reason or rationale.

(f) The injured employee shall not be required to submit to more than three required medical examinations at the request of the insurance carrier under this section within any 180 consecutive day period.

(g) The commission shall monitor all insurance carrier requests for medical examinations that are requested before the expiration of the 180-day period under subsections (d) and (e) of this section through statistical analysis, audits, or other appropriate means.

(h) An unreasonable request for an additional medical examination under subsections (d), (e) and (f) of this section includes:

(1) a request for an additional examination for a reason which does not comply with this section;

(2) a request for a different doctor without sufficient grounds;

(3) a request which would result in a violation of subsection (f) of this section; and

(4) a request which provides false, incomplete, or misleading information.

(i) An insurance carrier who unreasonably requests an additional required medical examination as defined in subsection (h) of this section, commits a Class B administrative violation. An insurance carrier who demonstrates a pattern of unreasonably requesting additional required medical examinations commits a Class A administrative violation.

§126.6. Order for Required Medical Examinations.

(a) When a request is made by the carrier, or a division of the commission, for a medical examination, the commission shall determine if an examination should be ordered. The commission shall issue an order granting or denying the request within seven days of the date the request is received by the commission. A copy of the order shall be sent to the **injured** employee, or the employee's representative, by certified mail, and by regular mail or personal delivery to the carrier. The order shall state the penalty cited in subsection (g) of this section. **An** [A written] agreement between the parties for an examination under §126.5 of this title (relating to Procedure for Requesting Required Medical Examinations) has the same effect as the commission's formal order.

(b) All examinations ordered must be scheduled as soon as possible, with at least 10 days notice to the [claimant or his] **injured employee or the employee's** representative. If a scheduling conflict exists, the **injured** employee must contact the doctor **prior to the examination** to re-schedule the examination to a time within seven days of the examination. In this event, the examining doctor shall notify the carrier.

(c) The **injured** employee's **treating** doctor, chosen under the **Texas Workers' Compensation** Act **(the Act)**, [§4.62] **Texas Labor Code, §408.022**, may be present at an examination scheduled according to subsection (b) of this section. The **injured** employee's **treating** doctor may observe the conduct of the examination, and may consult with the examining doctor about the course of the **injured** employee's treatment. The **injured** employee's **treating** doctor shall not otherwise participate in, or impede, the examination.

(d) If the required medical examination doctor, selected by an insurance carrier, refuses to allow the treating doctor to attend the examination, the insurance carrier shall cancel the appointment and request that another doctor be approved for the required medical examination. If reasonable notice is not provided to the injured employee or the employee's representative, the insurance carrier shall be liable for any reasonable travel expenses incurred by the injured employee and for the payment for the treating doctor's attendance at a refused appointment. This subsection shall not apply to situations where the treating doctor is not able to attend the examination due to any form of scheduling conflict. The required medical examination is not required to be scheduled based on the availability of the treating doctor.

(e) [(d)] An examining doctor who determines [whether] the **injured** employee has reached maximum medical improvement or who assigns an impairment rating shall complete and file the report as required by §§130.1 and 130.3 of this title (relating to Reports of Medical Evaluation; Maximum Medical Improvement and

Certification of Maximum Medical Improvement by Doctor Other than Treating Doctor). Other reports shall be completed according to applicable rules for [medical examination order reports in Chapter 133 of this title (relating to Medical Benefits; General Medical Provisions)] **consultant medical reports as described in §133.104 of this title (relating to Consultant Medical Reports)** and shall be sent to the carrier, **injured** employee, **the treating doctor**, and commission no later than **ten** [seven] days after the examination.

(f) [(e)] The commission shall, if disputed, hold a benefit review conference within 30 days after receiving notification that the examining doctor has released the **injured** employee to return to work, and the carrier shall continue benefits pending the benefit review conference.

(g) [(f)] A doctor who conducts an examination solely under the authority of an order issued according to this section shall not be considered a designated doctor under the Act, **§§408.122 or 408.125**. **Examinations with a designated doctor or a second opinion spinal surgery doctor under the Act, §408.026, are not subject to any limitations under the provisions for required medical examinations** [§4.25(b) or §4.26(g)].

(h) [(g)] An **injured** employee who, without good cause, fails or refuses to appear at the time scheduled for an examination authorized by this section may be assessed **a Class D** [an] administrative penalty [not to exceed $500] under the Act, **§408.004(f)** . **An injured employee who fails to submit to an examination at the insurance carrier's request when the carrier selected doctor refuses to allow the treating doctor to attend the examination shall not be subject to this administrative violation for that particular appointment** [§4.16(f)].

(i) [(h)] The commission shall order examinations requiring travel of up to 75 miles from the [claimant's] **injured employee's** residence unless the treating doctor certifies that such travel may be harmful to the [claimant's] **injured employee's** recovery. **The insurance carrier shall pay reasonable expenses incurred by the injured employee in submitting to any required medical examination.**

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711288
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 440-3700

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Chapter 134. Guidelines for Medical Services, Charges, and Payments

Subchapter K. Treatment Guidelines

28 TAC §134.1003

The Texas Workers' Compensation Commission proposes new §134.1003, concerning the Lower Extremities Treatment Guideline. The Medical Review Division of the Texas Workers' Compensation Commission prohibits use of this proposed Lower Extremities Treatment Guideline (LETG) prior to its adoption and effective date. The Commission does not condone, nor support application or implementation of this document in its entirety or any portion thereof as a clinical policy or in a clinical decision-making capacity to determine reimbursement for medical services or treatment provided in the workers' compensation arena.

The Lower Extremities Treatment Guideline is proposed to clarify those services that are reasonable and necessary for operative and nonoperative care of the lower extremities for the injured workers of Texas. The guideline is not to be used as a fixed treatment protocol, but rather identifies a reasonable and medically necessary normal course of treatment, and reflects typical courses of intervention. It is anticipated that there will be injured workers who will require less or more treatment than average. It is acknowledged that in atypical cases, treatment falling outside this guideline will occasionally be necessary. However, those cases that exceed the guideline level of treatment will be subject to more careful scrutiny and review and will require documentation of the special circumstances that justify the treatment. This guideline should not be seen as prescribing the type and frequency or length of intervention. Treatment must be based on patient need and professional judgement. The proposed rule is designed to function as a guideline and should not be used as the sole reason for denial of treatments and services. It is anticipated that this guideline will be subject to review and possible revision on a regular basis.

Subsection (a) of the proposed rule provides a table of contents for the Guideline. Subsection (b) contains the effective date, purpose, goals, development process and general philosophy of care for the Guideline. Subsection (c) describes the role of the treating doctor and subsection (d) describes how the proposed Guideline would be used by health care providers, insurance carriers, the TWCC Medical Review Division, consulting or peer review providers, injured workers, and employers. Subsection (e) sets out ground rules for use of the Guidelines and subsection (f) explains the use of the non-operative treatment tables which comprise the majority of the rule. Subsection (g) describes surgical indications for lower extremity injuries, subsection (h) contains a glossary of terms used in the Guideline, and subsection (i) is a bibliography of references used for this Guideline.

The clinical and diagnostic treatment guidelines contained in this new rule have been developed in conjunction with health care providers and other parties in the workers' compensation system. The Commission's Medical Review Division, in conjunction with the Commission's Medical Advisory Committee (MAC) and a broad representation from the medical community, have worked together to develop the Lower Extremities Treatment Guideline. By statute, the MAC is to advise the division in developing and administering the medical policies, fee guidelines, and utilization guidelines established under the Texas Labor Code, §413.011. The MAC advises the Commission or professional organization in the review and revision of medical policies and fee guidelines required under the Texas Labor Code, §413.012. The MAC is composed of members from the following fields, appointed by the Commission: public health care facility, private health care facility, a doctor of medicine, a doc-

tor of osteopathic medicine, a chiropractor, a dentist, a physical therapist, a pharmacist, a podiatrist, an occupational therapist, a medical equipment supplier, a registered nurse, a representative of employers, a representative of employees, and two representatives of the general public. The Medical Review Division also formed the Lower Extremities Treatment Guideline Workgroup composed of members from the following professions: chiropractic, medicine, physical therapy, podiatry, occupational therapy, and nursing. After the workgroup finalized a draft LETG, regional focus group meetings were held to collect opinions on the LETG draft. Separate focus groups were held for both chiropractors and medical doctors in Austin, Dallas, El Paso, Houston, and San Antonio. Input from the focus groups was used by the MAC in recommending changes and by the Medical Review Division in revising the draft.

During the development phase of this guideline, health care providers in the Lower Extremities Treatment Guideline Workgroup and the Commission's Medical Advisory Committee reviewed the guideline and provided input. Neither group reached consensus on the use of manipulation and acupuncture as reasonable and medically necessary treatments for various lower extremities diagnoses. An analysis of the TWCC medical bills database for the period April 1, 1996 through April 1, 1997 showed that these treatments are used in certain lower extremities diagnoses. Manipulation and acupuncture have been included in those diagnosis-specific treatment tables where the TWCC database of medical bills showed more than 5% of claimants with that diagnosis received these treatments. Due to the lack of consensus on this issue, the Commission asks that public comment regarding the use of these treatments in lower extremities diagnoses include diagnosis-specific, published, scientific studies supporting the commenter's view.

The guideline has been designed to achieve the following goals: (1) to assist all parties with regard to the appropriate treatment and management of lower extremity injuries; (2) to establish elements against which aspects of care can be compared; (3) to establish a guideline to exemplify clinically acceptable courses of treatment for specific disorders; (4) to establish documentation standards which support the appropriateness of the level of service; and (5) to provide a mechanism of prospective, concurrent, and retrospective review for efficient and effective health care utilization.

The development process involved a national search of state agencies administering workers' compensation programs, which revealed that only a few states had developed treatment guidelines. Research revealed a matrix approach to be the most understandable format for the guideline. A survey of the successful guidelines developed in the private sector identified that involvement from provider work groups achieved the best outcome regarding clinical policy development.

The guideline is proposed to promote quality health care, injury specific treatment and appropriateness of care, by identifying clinically acceptable courses of care for specific lower extremities injuries, and by facilitating communication between all parties in order to achieve rapid recovery from the effects of an injury. This communication will also promote a timely return to modified or full duty work that takes into account the job demands and the functional capabilities of the injured worker.

The Commission considered all relevant statutory and policy mandates and objectives and designed this rule to achieve those mandates and objectives, including the following:

(1) the establishment of medical policies and guidelines relating to use of medical services by employees who suffer compensable injuries;

(2) the establishment of medical policies relating to necessary treatments for injuries which are designed to ensure the quality of medical care and designed to achieve effective medical cost control;

(3) the establishment of a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatment and services; and

(4) the establishment of a program for systematic monitoring of the necessity of treatments administered, for detection of practices and patterns by insurance carriers in unreasonably denying authorization of payment, and for increasing the intensity of review for compliance with medical policies or fee guidelines.

New §134.1003 would achieve these objectives by:

(1) identifying services that are reasonable and medically necessary for treatment of lower extremity injuries;

(2) assisting all parties with regard to the appropriate treatment and management of disorders of the lower extremities in workers' compensation healthcare;

(3) establishing a guideline against which aspects of care can be compared;

(4) identifying clinically acceptable courses of care for specific lower extremity injuries;

(5) establishing documentation standards which support the appropriateness of the level of service for assessment/evaluation and on-going treatment;

(6) providing a mechanism for prospective, concurrent, retrospective review to ensure efficient and effective health care utilization; and

(7) establishing normal courses of treatment based on clinical indicators at different levels of healing.

In accordance with the statutory objectives and Commission policy, the Lower Extremities Treatment Guideline seeks to balance the need for cost control and review with the need for access to quality medical care by establishing typical courses of treatment, but allowing treatment outside the set parameters with additional documentation of the need for the treatment.

Quality of medical care is ensured by reliance upon input from experts and recognized studies in the field of lower extremities treatment, and establishment of normal courses of treatment and treatment parameters for specific lower extremities injuries. The guideline ensures access to health care and that quality care will be available in each individual case by its ground rules that allow for treatment outside the stated parameters.

Effective medical cost control is achieved by establishing parameters for eligibility and termination of treatment, by setting documentation standards which support the appropriateness of the treatment; by requiring additional documentation for

treatment falling outside the guideline's parameter; and by providing that treatments for lower extremities are subject to the Commission's separate rule requiring carrier preauthorization for certain treatments as a prerequisite to payment for the services.

The guideline allows for prospective, concurrent, and retrospective treatment by: setting standards for eligibility and treatment and setting documentation standards. These standards are to be used by health care providers as a basis for prospective review of possible treatment. The guideline and the documentation requirements should also provide the health care provider with a means to justify treatments when questioned concurrently or retrospectively by an insurance carrier.

The guideline and documentation also provide a starting point for carriers in conducting prospective, concurrent, or retrospective review of treatment. Finally, the Medical Review Division and the Compliance and Practices Division will also use the guideline and documentation as a tool for prospective, concurrent, and retrospective review of treatment, including use in conducting on-site audits of health care providers and insurance carriers, use in the establishment of a program for systematic monitoring of the necessity of treatments administered, and use in medical dispute resolution.

The guideline also promotes quality health care, injury specific treatment and appropriateness of care, by facilitating communication between all parties in order to achieve rapid recovery from the effects of an injury. This communication will also promote a timely return to modified or full duty work that takes into account the job demands and the functional capabilities of the injured worker.

Janet Chamness, Chief of Budget, has determined that for the first five-year period the rule is in effect there will be no or minimal fiscal implications as a result of enforcing or administering the rule.

For the first five years this rule is in effect, local government as a regulating entity is expected to have no additional or reduced costs and no loss or increase in revenue. Local government as a regulated entity will be impacted in the same manner as other persons required to comply with the rule as proposed. State government may realize a savings in costs or resources, as the number of disputes regarding lower extremity treatments and preauthorization requests should be reduced because the guideline clarifies what is a normal course of treatment and reflects typical courses of intervention. In addition, disputes as to lower extremity treatments and preauthorization requests should be resolved more quickly by the Medical Review Division for the same reason. There should be no loss or increase in revenue for state government.

Ms. Chamness has also determined that for each year of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing the rule will be the promotion of quality health care and injury specific treatment for injured workers by identifying clinically acceptable courses of care for specific lower extremities injuries. Another benefit will be that the rule will provide a mechanism to monitor the necessity of treatment administered and establish treatment parameters, thus providing greater efficiency in the provision of lower extremities treatment to the injured worker. The number of disputes regarding upper extremities treatments and preauthorization requests should be reduced because the guideline clarifies what is a normal course of treatment and reflects typical courses of intervention. In addition, fewer disputes should result in a reduction of costs to the workers' compensation system and in more timely and appropriate treatment of an injured worker.

Persons required to comply with the rule as proposed should experience a reduction in costs because the number of disputes regarding lower extremities treatments and preauthorization requests should be reduced by clarification of what is a normal course of treatment and typical courses of intervention. In addition, there may be a cost savings from quicker resolution of preauthorization and treatment disputes by the Medical Review Division. There will be no difference in cost of compliance for small businesses as compared to larger businesses.

Comments on the proposal or requests for public hearing must be received by 5:00 p.m. on Wednesday, October 8, 1997, and should be submitted to Elaine Crease, Office of the General Counsel, Mail Stop #4D, Texas Workers' Compensation Commission, Southfield Building, 4000 South IH-35, Austin, Texas 78704-7491. A public hearing will be scheduled for a later date.

Based upon comments received and the staff's or Commissioner's review of those comments, recommendations of staff or based upon action by the Commissioners at the public meeting, the rule as adopted may differ from the rule as proposed, including, but not limited to the inclusion or exclusion of manipulation and acupuncture in the treatment tables for some diagnoses.

Persons submitting comments regarding the appropriateness of the LETG, including the use manipulation and/or acupuncture as treatments for the lower extremities are requested to provide data or information to support their positions which can be substantiated by the Commission. Persons in support of the LETG as proposed may wish to comment to that effect. Commenters are encouraged to provide to the Commission with their comments the source of the data or information, the entity issuing the data or information and its address, the date the data or information was issued, and any information indicating how the data or information was determined to be valid or could be substantiated by the Commission.

The new rule is proposed under the Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; the Texas Labor Code, §413.011, which authorizes the Commission to establish by rule medical policies and guidelines relating to necessary treatments for injuries designed to ensure the quality of medical care and to achieve effective medical cost control; and §413.013, which authorizes the Commission to establish by rule a program for prospective, concurrent, and retrospective review and resolution of a dispute regarding health care treatments and services; and to establish by rule a program for the systematic monitoring of the necessity of treatments administered and fees charged and paid for medical treatments or services, including the authorization of prospective, concurrent, or retrospective review under the medical policies of the Commission to ensure that the medical policies or guidelines are not exceeded. These statutory provisions clearly authorize the Commission to propose a

rule such as §134.1003 which includes guidelines relating to necessary treatments for injuries and promotes resolution of disputes regarding health care treatments and services.

This rule affects the Texas Labor Code, §402.061, which authorizes the Commission to adopt rules necessary to administer the Act; the Texas Labor Code §413.011, which authorizes the Commission to establish by rule medical policies and guidelines relating to necessary treatments for injuries; the Texas Labor Code §413.013, which authorizes the Commission to establish certain programs; the Texas Labor Code §413.017, which sets out medical services which are presumed reasonable; the Texas Labor Code §413.018, which provides for the review of medical care if guidelines are exceeded; and the Texas Labor Code §413.031, which provides for medical dispute resolution.

§134.1003. Lower Extremities Treatment Guideline.

(a) Table of Contents. The following headings and corresponding subdivisions comprise a table of contents for this section:

(1) Introduction - subsection (b):

(A) Effective Date - subsection (b)(1);

(B) Purpose - subsection (b)(2);

(C) Goals - subsection (b)(3);

(D) Development Process - subsection (b)(4);

(E) Philosophy of Care - subsection (b)(5);

(2) Role of the Treating Doctor (Primary Gatekeeper) - subsection (c):

(A) Statutory Requirements - subsection (c)(1);

(B) Primary Gatekeeper Responsibilities - subsection (c)(2);

(C) Referrals - subsection (c)(3);

(D) Diagnostics - subsection (c)(4);

(E) Expectations and Compliance - subsection (c)(5);

(3) Application Instructions for Involved Parties/Concepts and Governing Principles - subsection (d):

(A) Health Care Provider - subsection (d)(1);

(B) Insurance Carriers - subsection (d)(2);

(C) Medical Review Division - subsection (d)(3);

(D) Consulting or Peer Review Health Care Provider - subsection (d)(4);

(E) Injured Worker - subsection (d)(5);

(F) Employer - subsection (d)(6);

(4) Ground Rules - subsection (e):

(A) Introduction - subsection (e)(1);

(B) Ground Rules - subsection (e)(2);

(C) General Documentation Requirements - subsection (e)(3);

(D) Documentation Requirements for Unrelated or Intercurrent Illness - subsection (e)(4);

(5) Nonoperative Treatment Tables - subsection (f):

(A) Introduction to Treatment Tables - subsection (f)(1);

(B) Definition of Levels of Care - subsection (f)(2);

(C) Foot - subsection (f)(3)

(D) Ankle - subsection (f)(4);

(E) Knee - subsection (f)(5);

(F) Hip - subsection (f)(6);

(G) Lower Extremity - subsection (f)(7);

(6) Surgical Indicators - subsection (g):

(A) Foot and Ankle - subsection (g)(1);

(B) Knee - subsection (g)(2);

(C) Hip - subsection (g)(3);

(D) Lower Extremity - subsection (g)(4);

(7) Glossary - subsection (h); and

(8) Bibliography - subsection (i).

(b) Introduction.

(1) Effective Date. This Guideline shall become effective January 1, 1998.

(2) Purpose. The purpose of this guideline is to clarify those services that are reasonable and medically necessary for treatment of lower extremity injuries for the injured workers of Texas. There may be injured workers who will require more or less treatment than is recommended in this guideline. This is a guideline and shall not be used as the sole reason for denial of treatments and services.

(3) Goals. The primary goals of this guideline are:

(A) to assist all parties with regard to the appropriate treatment and management of lower extremity injuries;

(B) to establish elements against which aspects of care can be compared;

(C) to establish a guideline to identify services that are reasonable and medically necessary for treatment of specific diagnoses;

(D) to establish documentation standards which support the appropriateness of the level of service; and

(E) to provide a mechanism of prospective, concurrent and retrospective review for efficient and effective health care utilization.

(4) Development Process. The Texas Workers' Compensation Commission (TWCC), in conjunction with health care providers and other parties in the system, have developed clinical and diagnostic treatment guidelines. Three major components in the guideline development process are as follows:

(A) Design and Methodology. A search of all 50 workers' compensation state agencies revealed that only a few had developed treatment guidelines. The format and design of these guidelines were mainly in narrative presentation. The focus of this treatment guideline is toward a matrix approach versus straight text.

(B) Provider Work Group. Research into successful guidelines developed in the private sector identified that involvement from provider work groups achieves the best outcome regarding clinical policy development.

(C) Public Evaluation. The evaluation of the developed guideline may be broad and include comments from employees, employers, health care providers and insurance carriers.

(5) Philosophy of Care. The health care of the injured worker is a coordinated team effort. All parties, including employees, employers, health care providers, insurance carriers and the Texas Workers' Compensation Commission should promote quality health care, injury specific treatment and appropriateness of care. Communication between all parties must remain open in order to achieve rapid recovery from the effects of the injury. This communication should promote a timely return to modified or full duty work that takes into account the job demands and the functional capabilities of the injured worker.

(c) Role of Treating Doctor (Primary Doctor/Gatekeeper).

(1) Statutory Requirements. The following sections of the Texas Labor Code and specific Commission rules address key areas pertaining to those services that are reasonable and necessary for treatment of the lower extremity.

(A) Section 408.021(a). An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. The employee is specifically entitled to health care that:

(i) cures or relieves the effects naturally resulting from the compensable injury;

(ii) promotes recovery; or

(iii) enhances the ability of the employee to return to or retain employment.

(B) Section 408.021(b). Medical benefits are payable from the date of the compensable injury.

(C) Section 408.021(c). Except in an emergency, all health care must be approved or recommended by the employee's treating doctor.

(D) Section 408.025(b). The commission by rule shall adopt reasonable requirements for reports and records to be made available to other health care providers to prevent unnecessary duplication of tests and examinations.

(E) Section 408.025(c). The treating doctor shall be responsible for maintaining efficient utilization of health care.

(2) Treating Doctor (Primary Doctor/Gatekeeper) Responsibilities.

(A) The role of the treating doctor is an important role which requires the treating doctor to monitor all health care services being provided for the injured worker. These responsibilities of the treating doctor are vital aspects of the goal to ensure that the injured worker receives quality health care. This monitoring extends to ensure:

(i) the identification of the extent and severity of the injury initially;

(ii) the appropriateness of all services;

(iii) the relatedness of all services to the workers' compensation injury;

(iv) separation and referral of non-related health care services for management by other health plans;

(v) whether the treatment is duplicative, necessary and/or effective;

(vi) the appropriate cost of the services;

(vii) the quality of the treatment; and

(viii) enhancement and promotion of effective communication among all involved parties.

(B) Refer to §126.9 and §133.3 of this title (relating to Choice of Treating Doctor and Liability for Payment; and Responsibilities of Treating Doctor, respectively) for responsibilities of the treating doctor.

(3) Referrals. The treating doctor is responsible for recommending timely and appropriate referrals. The treating doctor must clearly delineate the clinical rationale for all referrals. The documentation contained in the TWCC required reports should clearly outline whether the purpose of the referral is to corroborate the diagnosis and/or proposed course of treatment or to initiate ongoing treatment. Once a consultation or referral has occurred, the consulting or referral doctor shall submit a summary report or shall initiate a case management phone call back to the treating doctor.

(4) Diagnostics. Diagnostic work should be performed in accordance with the recommended testing and timeframes contained in this guideline. If the need arises to deviate from the guideline, then a clinical rationale must be provided which adequately substantiates the need for this deviation. The need to repeat previously completed diagnostic procedures due to the quality of the study may trigger a review. All health care providers involved in the treatment of an injured worker must share copies of all diagnostic studies, films, and reports in order to avoid unnecessary duplication of services. Section 133.2 of this title (relating to Sharing Medical Reports and Test Results) addresses the need to share medical records, including diagnostic studies, to avoid duplication. Section 133.106 of this title (relating to Fair and Reasonable Fees for Required Reports and Records) addresses reimbursement for copies of records.

(5) Expectation and Compliance.

(A) All health care providers must encourage injured workers to be active participants in their health care treatment regimens and must communicate to the injured worker realistic expectations regarding the potential outcome of this treatment as the treatment relates to his or her physical functioning and/or ability to return to work. Therefore, documenting the injured worker's compliance with his or her treatment regimen is important when reporting the progress of his or her recovery.

(B) Health care providers must explain to the injured worker in clear terms the extent and severity of the injury and the treatment needed. Health care providers must define the symptomatology that is directly and/or indirectly related to the injury and specify treatment not covered under workers' compensation.

(d) Application Instructions for Involved Parties / Concepts and Governing Principles.

(1) Health Care Provider. This guideline shall be used as a tool by the health care provider to establish the required elements to initiate and continue treatment. If a health care provider's treatment deviates from this guideline, documentation of the medical condition that specifically requires treatment outside the guideline parameters would be required to clearly delineate the need for the treatment.

(A) This guideline identifies typical treatment based on normal tissue healing responses for the average injured worker.

(B) This guideline recognizes that a subset of injured workers will be found to be outside the parameters of this guideline. If a health care provider's treatment deviates from this guideline, documentation would be required to clearly delineate the need for the treatment.

(C) This guideline should be used as a tool which identifies the recommended treatment parameters for treatment of injured workers within the workers' compensation system.

(D) This guideline identifies the need to provide documentation which clearly explains the reason for the treatment, the relatedness to the workers' compensation injury and alternative treatment.

(E) The health care provider is responsible for educating the injured worker of health care treatment appropriate for the workers' compensation injury.

(F) This guideline recommends early return to work of either full or modified job duties based upon the injured worker's functional capacity which includes ability and clinical status.

(G) The health care provider is responsible for formulating a treatment plan and revising the treatment plan based on response to treatment. The treatment plan should be provided to the insurance carrier as early as possible.

(2) Insurance Carriers. The insurance carrier shall use this guideline to compare treatment prospectively, concurrently and retrospectively with the predetermined elements contained in the guides.

(A) This document and its parameters serve only as a guideline and shall not be used as the sole reason for denial of treatments and services.

(B) This guideline provides a tool by which to monitor the injured worker's recovery process.

(C) This guideline serves as a tool to assist the insurance carriers in the medical audit process.

(D) This guideline shall not be used to direct care toward a specific health care discipline or to a specific type of treatment. The insurance carrier is responsible for providing their specific documentation and rationale if treatment is denied. This rationale may include elements of the guideline. Additional information regarding the rationale for denial of treatment may also be derived from the injured worker's medical records and from the professional opinion of a peer review, if utilized.

(E) A subset of injured workers will be found to be outside the parameters of this guideline. If a health care provider's treatment deviates from this guideline, documentation would be required to clearly delineate the need for the treatment.

(F) The insurance carrier is responsible for performing a focus review of injury. This focus review shall primarily consist of case management. The focus review must clarify and attempt to reach agreement that the proposed treatment is appropriate as early as possible. Concurrent case management and bill review activities should address and focus on:

(i) adherence to treatment plans;

(ii) clinical progress;

(iii) return to work issues;

(iv) medical necessity;

(v) injured worker compliance with the treatment;

(vi) services provided consistent with the treatment plan;

(vii) response to treatment;

(viii) improvement in injured workers' progress;

(ix) recommendations for changes in treatment in situations where there is no compliance, plateau, and/or there is minimal or no progress; and

(x) achievement of goals, improvement sooner than treatment plan indicated.

(3) Medical Review Division. The Medical Review Division shall use the guideline as a tool for the basis of their administrative review of prospective, concurrent and retrospective treatment. This guideline shall also be used as a tool in conducting on-site and desk audits for both health care providers and insurance carriers.

(4) Consulting or Peer Review Health Care Provider. This guideline shall be used as a reference in advising the Medical Review Division and to determine when the need for an unbiased medical opinion is indicated. The peer reviewer shall use his or her clinical expertise in conjunction with the clinical intent of the guideline to address issues.

(5) Injured Worker. The injured worker must understand his or her role in complying with recommended treatment. The recovery and return to work process requires active cooperation of the injured worker.

(6) Employer. The employer shall be responsible for reporting the compensable injury in a timely fashion to ensure that there is no delay in the treatment of the compensable injury. The employer shall be responsible for working with the insurance carrier and health care providers to ensure that the injured worker is afforded the opportunity to return to work in either a modified or full employment capacity as rapidly as possible within the medical limitations of his or her injury.

(e) Ground Rules.

(1) Introduction. Texas Workers' Compensation Commission treatment guidelines are not to be used as fixed treatment protocols. The guidelines reflect services that are reasonable and medically necessary for treatment of lower extremity injuries. The guidelines recognize that a subset of injured workers will be found to be outside the guidelines' parameters. However, cases exceeding the guidelines' level of treatment shall be subject to more careful scrutiny and review and shall require documentation of the special

circumstances justifying that treatment. The guidelines should not be seen as prescribing the type, frequency, or duration of treatment. Treatment must be based on the injured worker's need and the doctor's professional judgment.

(2) Ground Rules.

(A) Notwithstanding any other provision of this rule, treatment of a work related injury must be:

(i) adequately documented;

(ii) evaluated for effectiveness and modified based on clinical changes;

(iii) provided in the least intensive setting;

(iv) cost effective;

(v) consistent with this guideline which may include providing a documented clinical rationale for deviation from this guideline;

(vi) objectively measured and demonstrate functional gains; and

(vii) consistent in demonstrating ongoing progress in the recovery process by appropriate re-evaluation of the treatment.

(B) Communication between all health care providers involved in treating the injured worker must ensure that all previous treatment and diagnostic tests are considered when developing a treatment plan. All reports and records shall be made available to all health care providers to prevent unnecessary duplication of tests and examinations. (Refer to subsection (c)(2), (3) and (4) of this section.)

(C) Patient education is an essential component in ensuring patient compliance to all treatment. Education is essential for the active cooperation of the patient in all aspects of health care and as a means to prevent re-injury. The patient must understand his or her role in the recovery and return to work processes.

(D) All parties in the workers' compensation system should work together to ensure that the injured worker returns to work at the earliest medically appropriate time. Return-to-work is an important therapeutic approach which benefits the injured worker. The health care provider shall communicate with the injured worker, employer and the insurance carrier to coordinate a successful return to work.

(E) The level of service shall be the same as the health care provider's usual and customary level of service regardless of the payor system.

(F) Although not the typical course of treatment, there may be circumstances in which the injured worker may move between levels of care or utilize interventions in more than one level of care simultaneously, depending on clinical indicators.

(G) All health care providers treating an injured worker are responsible for substantiating in their documentation the level of service for which they request reimbursement. All payors have the responsibility to review all documentation submitted as the basis for the treatment and services provided.

(H) Treatment durations are cumulative; however it may not always be necessary to use full durations for any given level of care.

(I) Any new treatment must meet acceptable standards of care (as defined the Glossary -subsection (h) of this section) and may be subject to review by Texas Workers' Compensation Commission.

(J) Preauthorization of any treatments or services shall be as required in the Commission's preauthorization rule.

(K) When the injured worker displays signs and symptoms which may require further evaluation by a Qualified Mental Health Provider, refer to §134.1000 of this title (relating to Mental Health Treatment Guideline) for parameters regarding documentation, evaluation and treatment.

(L) When an injured worker must travel in order to obtain appropriate and necessary medical care for a compensable injury, reimbursement for travel expenses is governed by §134.6 of this title (relating to Travel Expenses).

(3) General Documentation Requirements.

(A) The health care provider's documentation is vital as an information source of the injured worker's injury and treatment, and also provides information which impacts income benefits. For these reasons, many of the Commission's rules have set time requirements for submission of required reports. For more information, refer to Chapter 133 Subchapter B of this title, (relating to Required Reports).

(B) Documentation shall be provided by the health care provider to determine the level of care to be provided and the necessity for that care. The elements of the documentation may include:

(i) a description of the injury, including the events surrounding that injury and the extent and severity of that injury;

(ii) a description of any pre-existing condition(s), complicating conditions and/or any non-related conditions;

(iii) a treatment plan, including proposed methods of treatment, expected outcomes, and probable duration of treatment;

(iv) updates to the treatment plan as needed, including the clinical progress of the injured worker, and any revisions needed to the treatment plan based on the injured worker's response to treatment;

(v) education/information provided to the injured worker regarding his or her injury and treatment plan, and the injured worker's compliance with this treatment plan; and

(vi) documentation substantiating the need for deviation from the guideline, if necessary.

(C) Permanent impairment for compensable injuries in workers' compensation shall be limited to those injuries and illnesses for which doctors are able to demonstrate objective findings.

(D) The need for emergency treatment must be based on the doctor's professional judgment. This documentation must provide a clear explanation of the nature of the emergency, the injured worker's medical condition, complications which could occur, as well as any irreversible conditions which occurred or could occur as a result of the emergency.

(4) Documentation Requirements for Unrelated or Intercurrent Illness. Situations may arise where certain medical conditions

need to be delineated or clarified prior to intervention. Treatment administered to other body areas (not a part of the original injury) or for a pre-existing medical condition(s) must be identified and the relation of this treatment to the compensable injury must be documented by the health care provider. If this treatment appears not to be related to the compensable injury, then the health care provider should inform the injured worker that this treatment may not be covered by the insurance carrier. The health care provider should clearly document the rationale for such treatment and its relation to the compensable injury.

(f) Nonoperative Treatment Tables (Refer to subsection (g) of this section for Surgical Indications).

(1) Introduction to Nonoperative Treatment Table. The treatments, set out in the following tables, represent treatment that is reasonable and medically necessary for a given period of time according to the diagnosis(es). The "Treatment Interventions" sections and "Diagnostic Procedures" sections of the Treatment Tables are in alphabetical order and do not infer numerical sequence. There will be some injured workers who require less treatment, and other injured workers who require more treatment than is outlined. This document serves as a guideline and should not be used as the sole reason for denial or requirement of treatment. The provision of specific services to an injured worker is dependent on the injured worker's diagnosis, and response to treatment.

(2) Definition of Levels of Care.

(A) Primary Level of Care. This level of care is generally considered to be appropriate for injured workers immediately following the compensable injury; however, the injured worker in this level of care may also be an early postoperative patient or may be experiencing an acute exacerbation of his or her chronic condition. Since partial or total cessation of work over a brief period of time is also considered to be part of the primary level of care, further treatment by a health care provider may not be considered necessary at this level of care. Little or no deconditioning has occurred due to the injury, immobilization or decreased activity. The goals are to prevent disease, alleviate or minimize the effects of the illness or injury and to maintain function, thereby reducing lost time and enabling return to work in some capacity.

(B) Secondary Level of Care. This level of care is for those injured workers who have not returned to productivity after the normal healing process. This level of care is designed to facilitate return to productivity, including return to work in either full or modified duty, before the onset of chronic disability. This level of care may also be indicated for the injured worker whose physical capacity to work still does not meet the job requirements for heavy physical labor after adequate treatment, thereby causing an inability to return to full duty. This level of care is individualized, time limited and of limited intensity. The injured worker has a history of a limited-to-good response to early primary treatment with persistent symptoms limiting activities of daily living. The objective physical examination demonstrates findings suggestive of early deconditioning including decreased range of motion and/or strength and limitation of activities of daily living. Evidence of mental health or psychosocial barriers may be present which impede the injured worker's clinical progress.

(C) Tertiary Level of Care. This level of care is interdisciplinary, individualized, coordinated, and intensive. It is designed for the injured worker who demonstrates physical and psychological changes consistent with chronic disability. In general, differentiation from secondary treatment includes medical direction, intensity of services, severity of injury, individualized programmatic protocols with integration of physician, mental health, and disability or pain management services and specificity of physical/psychosocial assessment. This level includes a documented history of persistent failure to respond to nonoperative or operative treatment which surpasses the usual healing period for that injury. Psychosocial issues such as substance abuse, affective disorders, and other psychological disorders may be present. This level of care is indicated by a documented inhibition of physical functioning evidenced by pain sensitivity, loss of sensation, and nonorganic signs such as fear which produce a physical inhibition or limited response to reactivation treatment. This level of care may also be indicated for the injured worker whose physical capacity to work still does not meet the job requirements for heavy physical labor after adequate treatment, thereby causing an inability to return to full duty. This situation would be evidenced by an excessive transitional period of light duty or significant episodes of lost work time due to the need for continued medical treatment. This level of care is also indicated for those injured workers who cannot tolerate either primary or secondary levels of care.

(D) Criteria to Distinguish Between Secondary and Tertiary Level of Care. Many factors may determine the choice between secondary and tertiary levels of care. In general, if lower cost secondary treatment can be effective, this level of care is preferred over the more expensive tertiary care. However, if the documented condition of the injured worker indicates the need for more intensive treatment, the tertiary level of care may be more appropriate. Key factors in determining the need for secondary versus tertiary care include:

(i) the time elapsed since injury;

(ii) the presence of psychosocial barriers to recovery such as depression, substance abuse, personality disorder, etc., and the severity of these barriers;

(iii) the lack of responsiveness to previously attempted treatment;

(iv) the severity of physical/functional deconditioning; and/or

(v) socioeconomic barriers to recovery.

(3) Foot Treatment Tables.

(A) Diagnosis: Foot: Plantar Fasciitis; Primary Level of Care.
Figure 1: 28 TAC §134.1003 (f)(3)(A)

(B) Diagnosis: Foot: Plantar Fasciitis; Secondary Level of Care.
Figure 2: 28 TAC §134.1003 (f)(3)(B)

(C) Diagnosis: Foot: Plantar Fasciitis; Tertiary Level of Care.
Figure 3: 28 TAC §134.1003(f)(3)(C)

(4) Ankle Treatment Tables.

(A) Diagnosis: Ankle: Musculotendinitis; Bursitis/ Tenosynovitis; Primary Level of Care.
Figure 4: 28 TAC §134.1003 (f)(4)(A)

(B) Diagnosis: Ankle: Musculotendinitis; Bursitis/ Tenosynovitis; Secondary Level of Care.
Figure 5: 28 TAC §134.1003 (f)(4)(B)

(C) Diagnosis: Ankle: Musculotendinitis; Bursitis/ Tenosynovitis; Tertiary Level of Care.
Figure 6: 28 TAC §134.1003 (f)(4)(C)

(D) Diagnosis: Ankle: Sprain/Strain Tear; Primary Level of Care.
Figure 7: 28 TAC §134.1003 (f)(4)(D)

(E) Diagnosis: Ankle: Sprain/Strain Tear; Secondary Level of Care.
Figure 8: 28 TAC §134.1003 (f)(4)(E)

(F) Diagnosis: Ankle: Sprain/Strain Tear; Tertiary Level of Care.
Figure 9: 28 TAC §134.1003 (f)(4)(F)

(G) Diagnosis: Ankle Fracture; Primary Level of Care.
Figure 10: 28 TAC §134.1003 (f)(4)(G)

(H) Diagnosis: Ankle Fracture; Secondary Level of Care.
Figure 11: 28 TAC §134.1003 (f)(4)(H)

(I) Diagnosis: Ankle Fracture; Tertiary Level of Care.
Figure 12: 28 TAC §134.1003 (f)(4)(I)

(5) Knee Treatment Tables.

(A) Diagnosis: Knee: Musculotendinitis; Bursitis/ Tenosynovitis; Primary Level of Care.
Figure 13: 28 TAC §134.1003 (f)(5)(A)

(B) Diagnosis: Knee: Musculotendinitis; Bursitis/ Tenosynovitis; Secondary Level of Care.
Figure 14: 28 TAC §134.1003 (f)(5)(B)

(C) Diagnosis: Knee: Musculotendinitis; Bursitis/ Tenosynovitis; Tertiary Level of Care.
Figure 15: 28 TAC §134.1003 (f)(5)(C)

(D) Diagnosis: Knee Meniscus Tear Bursitis/ Tenosynovitis; Primary Level of Care.
Figure 16: 28 TAC §134.1003 (f)(5)(D)

(E) Diagnosis: Knee Meniscus Tear Bursitis/ Tenosynovitis; Secondary Level of Care.
Figure 17: 28 TAC §134.1003 (f)(5)(E)

(F) Diagnosis: Knee Meniscus Tear Bursitis/ Tenosynovitis; Tertiary Level of Care.
Figure 18: 28 TAC §134.1003 (f)(5)(F)

(G) Diagnosis: Knee: Sprain/Strain, Tear; Primary Level of Care.
Figure: 19 28 TAC §134.1003 (f)(5)(G)

(H) Diagnosis: Knee: Sprain/Strain, Tear; Secondary Level of Care.
Figure 20: 28 TAC §134.1003 (f)(5)(H)

(I) Diagnosis: Knee: Sprain/Strain, Tear; Tertiary Level of Care.
Figure 21: 28 TAC §134.1003 (f)(5)(I)

(J) Diagnosis: Patellar Fracture; Primary Level of Care.
Figure 22: 28 TAC §134.1003 (f)(5)(J)

(K) Diagnosis: Patellar Fracture; Secondary Level of Care.
Figure 23: 28 TAC §134.1003 (f)(5)(K)

(L) Diagnosis: Patellar Fracture; Tertiary Level of Care.
Figure 24: 28 TAC §134.1003 (f)(5)(L)

(6) Hip Treatment Tables.

(A) Diagnosis: Hip: Musculotendinitis; Bursitis/ Tenosynovitis; Primary Level of Care.
Figure 25: 28 TAC §134.1003 (f)(6)(A)

(B) Diagnosis: Hip: Musculotendinitis; Bursitis/ Tenosynovitis; Secondary Level of Care.
Figure 26: 28 TAC §134.1003 (f)(6)(B)

(C) Diagnosis: Hip: Musculotendinitis; Bursitis/ Tenosynovitis; Tertiary Level of Care.
Figure 27: 28 TAC §134.1003 (f)(6)(C)

(D) Diagnosis: Hip: Fracture of Hip Joint; Primary Level of Care.
Figure 28: 28 TAC §134.1003 (f)(6)(D)

(E) Diagnosis: Hip: Fracture of Hip Joint; Secondary Level of Care.
Figure 29: 28 TAC §134.1003 (f)(6)(E)

(F) Diagnosis: Hip: Fracture of Hip Joint; Tear; Tertiary Level of Care.
Figure 30: 28 TAC §134.1003 (f)(6)(F)

(7) Lower Extremity Treatment Tables.

(A) Diagnosis: Neuropathy; Primary Level of Care.
Figure 31: 28 TAC §134.1003 (f)(7)(A)

(B) Diagnosis: Neuropathy; Secondary Level of Care.
Figure 32: 28 TAC §134.1003 (f)(7)(B)

(C) Diagnosis: Neuropathy; Tertiary Level of Care.
Figure 33: 28 TAC §134.1003 (f)(7)(C)

(D) Diagnosis: Fractures; Primary Level of Care.
Figure 34: 28 TAC §134.1003 (f)(7)(D)

(E) Diagnosis: Fractures; Secondary Level of Care.
Figure 35: 28 TAC §134.1003 (f)(7)(E)

(F) Diagnosis: Fractures; Tertiary Level of Care.
Figure 36: 28 TAC §134.1003 (f)(7)(F)

(G) Diagnosis: Avascular Necrosis; Primary Level of Care.
Figure 37: 28 TAC §134.1003 (f)(7)(G)

(H) Diagnosis: Avascular Necrosis; Secondary Level of Care.
Figure 38: 28 TAC §134.1003 (f)(7)(H)

(I) Diagnosis: Avascular Necrosis; Tertiary Level of Care.
Figure 39: 28 TAC §134.1003 (f)(7)(I)

(J) Diagnosis: Intra-Articular Pathology, Traumatic Arthritis; Primary Level of Care.
Figure 40: 28 TAC §134.1003 (f)(7)(J)

(K) Diagnosis: Intra-Articular Pathology, Traumatic Arthritis; Secondary Level of Care.
Figure 41: 28 TAC §134.1003 (f)(7)(K)

(L) Diagnosis: Intra-Articular Pathology, Traumatic Arthritis; Tertiary Level of Care.
Figure 42: 28 TAC §134.1003 (f)(7)(L)

(M) Diagnosis: Lacerations: Tendons, Nerves; Primary Level of Care.
Figure 43: 28 TAC §134.1003 (f)(7)(M)

(N) Diagnosis: Lacerations: Tendons, Nerves; Secondary Level of Care.
Figure 44: 28 TAC §134.1003 (f)(7)(N)

(O) Diagnosis: Lacerations: Tendons, Nerves; Tertiary Level of Care.
Figure 45: 28 TAC §134.1003 (f)(7)(O)

(P) Diagnosis: Crush Injuries; Primary Level of Care.
Figure 46: 28 TAC §134.1003 (f)(7)(P)

(Q) Diagnosis: Crush Injuries; Secondary Level of Care.
Figure 47: 28 TAC §134.1003 (f)(7)(Q)

(R) Diagnosis: Crush Injuries; Tertiary Level of Care.
Figure 48: 28 TAC §134.1003 (f)(7)(R)

(S) Diagnosis: Myofascial Pain Syndrome; Primary Level of Care.
Figure 49: 28 TAC §134.1003 (f)(7)(S)

(T) Diagnosis: Myofascial Pain Syndrome; Secondary Level of Care.
Figure 50: 28 TAC §134.1003 (f)(7)(T)

(U) Diagnosis: Myofascial Pain Syndrome; Tertiary Level of Care.
Figure 51: 28 TAC §134.1003 (f)(7)(U)

(g) Surgical Indications. A pre-surgical mental health evaluation may be obtained. Please refer to §134.1000 of this title (relating to Mental Health Treatment Guideline) for parameters regarding documentation, evaluation and treatment. Indications for surgery include but are not limited to the following list.

(1) Ankle and Foot.

(A) Musculotendinitis, Bursitis/Tenosynovitis. Indications for surgery include but are not limited to:

(i) failure to respond to non-operative treatment over a period of three months;

(ii) no improvement after a total of two corticosteroid injections;

(iii) early surgical intervention (before three months), which may be considered if the patient is severely disabled; and

(iv) infection is present.

(B) Ligament/Tendon, Tear. Indications for surgery include but are not limited to:

(i) failure to respond to non-operative treatment; and

(ii) recurrent sprain with documented instability.

(C) Fracture. Indications for surgery include but are not limited to:

(i) displaced fracture requiring reduction and fixation;

(ii) comminuted displaced fracture requiring reduction and fixation;

(iii) open fracture; and

(iv) nonunion/avascular necrosis (AVN) of fracture.

(D) Arthralgia.

(i) Avascular Necrosis/Osteonecrosis, Osteochondritis Dissecans

(ii) Traumatic Arthritis

(iii) Chronic pain (more than 6weeks), swelling unresponsive to conservative care

(2) Knee.

(A) Musculotendinitis, Bursitis/Tenosynovitis. Indications for surgery include but are not limited to:

(i) failure to respond to non-operative treatment over a period of three months;

(ii) early surgical intervention (before three months), which may be considered if the patient is severely disabled;

(iii) infection is present.

(B) Meniscus Tear. Indications for surgery include but are not limited to:

(i) mechanical symptoms (locking, giving way, etc.); and

(ii) failure to respond to conservative care.

(C) Ligament/Tendon Injury. Indications for surgery include but are not limited to:

(i) failure to respond to conservative care; and

(ii) instability.

(D) Patellar Fracture. Indication for surgery include but are not limited to disruption of quad mechanism. Also see paragraph (4)(B) of this subsection.

(3) Hip.

(A) Musculotendinitis, Bursitis/Tenosynovitis. Indications for surgery include but are not limited to:

(i) failure to respond to non-operative treatment over a period of three months;

(ii) no improvement after a total of three corticosteroid injections;

(iii) early surgical intervention (before three months), which may be considered if the patient is severely disabled; and

(iv) infection is present.

(B) Sprain/Strain. Indications for surgery include but are not limited to failure to respond to conservative care.

(C) Fracture. Displaced fracture except avulsion fractures of greater trochanter and lesser trochanter. Indications for surgery include but are not limited to:

(i) nonunion of fracture; and

(ii) open fracture.

(D) Avascular Necrosis. Indications for surgery include but are not limited to failure to respond to conservative care.

(E) Degenerative Arthritis. Indications for surgery include but are not limited to failure to respond to conservative care.

(4) Lower Extremity.

(A) Nerve Compression (Compressive Neuropathy). Indications for surgery include but are not limited to:

(i) positive physical findings and symptoms that are persistent despite conservative management; and

(ii) traumatic neuropathy with scarring.

(B) Fracture: Femur, Tibia, Tarsal & Metatarsal. Indications for surgery include but are not limited to:

(i) displaced fracture and/or dislocation;

(ii) open fracture; and

(iii) nonunion of fracture.

(C) Arthropathy. Indications for surgery include but are not limited to:

(i) pain over a period of three months;

(ii) articular incongruity; and

(iii) mechanical symptoms.

(D) Intra-articular Pathology; Traumatic Arthritis: Pelvis, Thigh, Knee, Lower leg, Ankle and Foot. Indications for surgery include but are not limited to:

(i) persistent synovitis unresponsive to conservative care over a period of three months;

(ii) mechanical symptoms (locking, giving way, etc.); and

(iii) painful traumatic arthritis corroborated by imaging study (CT/MRI, Tech 99).

(E) Joint Instability: Pelvis, Knee, Ankle and Foot; Indications for surgery include, but are not limited to repeated episodes of instability despite conservative therapy.

(F) Lacerations; Tendons and Nerves: Hip, Thigh, Knee, Lower leg, Ankle and Foot. Indications for surgery include but are not limited to:

(i) complete laceration;

(ii) partial laceration with disruption of function; and

(iii) contaminated wound.

(G) Crush Injuries: Hip, Thigh, Knee, Lower Leg, Foot and Toes. Indications for surgery include but are not limited to:

(i) compartment syndrome; and

(ii) open wounds requiring debridement.

(h) Glossary.

(1) Acceptable standards of care.

(A) Standard - something established by authority, custom, or general consent as a model or example; the generally accepted norm for quality and quantity.

(B) Acceptable standards of care - outlines of the types of tests and treatments which are established as normal and warranted for a specific type of injury.

(2) Assessment/Evaluation - the act or process of inspecting or testing for evidence of injury, disease or abnormality.

(3) Chronic pain management - a program which provides coordinated, goal-oriented, interdisciplinary team services to reduce pain, improve functioning, and decrease the dependence on the health care system of persons with chronic pain syndrome.

(4) Clinical progress versus lack of clinical progress.

(A) Clinical progress - documented improvement in the condition of the injured worker, in response to the injured worker's current treatment program.

(B) Lack of clinical progress - documented absence of change in the condition of the injured worker over a period of time of no less than one month, requiring re-evaluation of the injured worker's condition and re-evaluation of the current treatment program.

(5) Consulting doctor - a doctor who provides an opinion or advice regarding the evaluation and/or management of a specific problem, as requested by the treating doctor, the Commission, or the insurance carrier. A consulting doctor may only initiate diagnostic and/or therapeutic services with approval from the treating doctor (see the definition of "referral doctor" in paragraph (31) of this subsection).

(6) Denial parameters - a set of established elements or boundaries beyond which testing or treatment may be denied.

(7) Diagnosis - the art or act of identifying a disease or injury from evaluation of its signs and symptoms.

(8) Diagnostic tests - objective studies performed to assist in identifying a disease, injury, or abnormality.

(9) Doctor - a doctor of medicine, osteopathic medicine, optometry, dentistry, podiatry, or chiropractic who is licensed and authorized to practice.

(10) Examination - the act or process of inspecting or testing for evidence of disease, injury, or abnormality.

(11) Focus review - to critically examine the prospective, concurrent, and retrospective care received by the injured worker as related to the compensable injury.

(12) Frequency of intervention - the number of occurrences in a specified time in which the health care provider acts to treat the injured worker.

(13) Functional capacity evaluation - a battery of tests administered and evaluated to determine the injured worker's ability to perform tasks related to both his or her daily activities and his or her job performance. This evaluation consists of the following elements:

(A) a physical examination and neurological evaluation which includes an assessment of the physical appearance of the injured worker, flexibility of the extremity joint or spinal region, posture and deformities, vascular integrity, the presence or absence of sensory deficit, muscle strength and reflex symmetry;

(B) a physical capacity evaluation which includes quantitative measurements of range of motion and muscular strength and endurance; and

(C) a dynamic functional abilities test which includes activities of daily living, hand function tests, cardiovascular endurance tests, and static positional tolerance.

(14) Gatekeeper - the doctor primarily responsible for the employee's health care for an injury (synonymous with the terms "treating doctor" and "primary gatekeeper").

(15) Health care facility - means a hospital, emergency clinic, outpatient clinic, or other facility providing health care.

(16) Health Care Practitioner.

(A) an individual who is licensed to provide or render and provides or renders health care; or

(B) a non-licensed individual who provides or renders health care under the direction or supervision of a doctor.

(17) Health care provider - a health care facility or health care practitioner.

(18) Impairment - any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent.

(19) Interdisciplinary programs - programs in which the delivery of services is provided by more than one type of health care service (e.g., occupational therapy, physical therapy, counseling services, medical services) and in which there is a coordination between the disciplines regarding the care plan and the delivery of care to the injured worker. This type of program includes work hardening, outpatient medical rehabilitation and chronic pain management.

(20) Intervention - the act or fact of interfering with a condition to modify it or with a process to change its course.

(21) Level of service - refers to primary, secondary, or tertiary care.

(22) Maximum Medical Improvement (MMI) - the earlier of the following two items:

(A) the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated; or

(B) the expiration of 104 weeks from the date on which income benefits begin to accrue.

(23) Medical necessity - the determination that the tests or treatment provided is required based on the presenting signs and symptoms.

(24) Objective findings - signs, or test results that can be measured or quantified or are otherwise perceptible to persons other than the affected individual. A medical finding of impairment resulting from a compensable injury, based on competent objective medical evidence, that is independently confirmable by a doctor, including a designated doctor, without reliance on the subjective symptoms perceived by the employee.

(25) Outpatient medical rehabilitation - a program of coordinated and integrated services, evaluation, and/or treatment with emphasis on improving the functional levels of the persons served. The program is interdisciplinary in nature and is applicable to those persons who have severe functional limitations of recent onset or recent regression or progression or those persons who have not had prior exposure to rehabilitation. Services may be directed toward the development and/or maintenance of the optimal level of functioning and community integration of the persons served.

(26) Primary gatekeeper - the doctor primarily responsible for the employee's health care for an injury (synonymous with the terms "treating doctor" and "primary gatekeeper").

(27) Primary/secondary/tertiary levels of care.

(A) Primary Level of Care. This level of care is generally considered to be appropriate for injured workers immediately following the compensable injury; however, the injured worker in this level of care may also be an early postoperative patient or may be experiencing an acute exacerbation of his or her chronic condition. Since partial or total cessation of work over a brief period of time is also considered to be part of the primary level of care, further treatment by a health care provider may not be considered necessary at this level of care. Little or no deconditioning has occurred due to the injury, immobilization or decreased activity. The goals are to prevent disease, alleviate or minimize the effects of the illness or injury and to maintain function, thereby reducing lost time and enabling return to work in some capacity.

(B) Secondary Level of Care. This level of care is for those injured workers who have not returned to productivity after the normal healing process. This level of care is designed to facilitate return to productivity, including return to work in either full or modified duty, before the onset of chronic disability. This level of care may also be indicated for the injured worker whose physical capacity to work still does not meet the job requirements for heavy physical labor after adequate treatment, thereby causing an inability to return to full duty. This level of care is individualized, time limited and of limited intensity. The injured worker has a history of a limited-to-good response to early primary treatment with persistent symptoms limiting activities of daily living. The objective physical examination demonstrates findings suggestive of early deconditioning including decreased range of motion and/or strength and limitation of activities of daily living. Evidence of mental health or psychosocial barriers may be present which impede the injured worker's clinical progress.

(C) Tertiary Level of Care. This level of care is interdisciplinary, individualized, coordinated, and intensive. It is designed for the injured worker who demonstrates physical and

psychological changes consistent with chronic disability. In general, differentiation from secondary treatment includes medical direction, intensity of services, severity of injury, individualized programmatic protocols with integration of physician, mental health, and disability or pain management services and specificity of physical/psychosocial assessment. This level includes a documented history of persistent failure to respond to nonoperative or operative treatment which surpasses the usual healing period for that injury. Psychosocial issues such as substance abuse, affective disorders, and other psychological disorders may be present. This level of care is indicated by a documented inhibition of physical functioning evidenced by pain sensitivity, loss of sensation, and nonorganic signs such as fear which produce a physical inhibition or limited response to reactivation treatment. This level of care may also be indicated for the injured worker whose physical capacity to work still does not meet the job requirements for heavy physical labor after adequate treatment, thereby causing an inability to return to full duty. This situation would be evidenced by an excessive transitional period of light duty or significant episodes of lost work time due to the need for continued medical treatment. This level of care is also indicated for those injured workers who cannot tolerate either primary or secondary levels of care.

(28) Proper clinical documentation - written records which meet the requirements outlined by statute and rule and which convey the following information to the required parties:

(A) a description of the injury, including the extent, severity and events surrounding that injury;

(B) a description of any pre-existing, complicating and/or any non-related conditions;

(C) a treatment plan, including proposed methods, frequency, and probable duration of treatment, with expected outcomes;

(D) updates to the treatment plan as needed, including the clinical progress of the injured worker and any revisions needed to the treatment plan in light of the injured worker's response to treatment;

(E) education/information provided to the injured worker regarding his or her injury and treatment plan, and the injured worker's compliance with this treatment plan; and

(F) documentation substantiating the need for deviation from the guideline, if necessary.

(29) Reason for denial - refer to paragraph (6) of this subsection on denial parameters.

(30) Referral - the process of directing or redirecting (as a medical case or a patient) to an appropriate specialist or agency for definitive treatment.

(31) Referral doctor - a consulting doctor who initiates health care treatments at the request or with the consent of the treating doctor.

(32) Secondary treatment - refer to paragraph (27)(B) of this subsection regarding secondary level of care.

(33) Self-referral - the direction of a patient to another doctor, institution or facility wherein the referring doctor has a financial or conflict of interest element.

(34) Sprain - an injury to a ligament.

(A) Mild (Grade 1) - only a few fibers are torn; ligament is mostly intact and the joint is stable.

(B) Moderate (Grade 2) - more fibers are torn, resulting in some instability with abnormal joint motion and some functional loss.

(C) Severe (Grade 3) - ligaments are completely disrupted and instability may be severe (synonymous with marked).

(35) Strain - an injury to a muscle.

(A) Mild (Grade 1) - only a few fibers are torn; muscle is mostly intact and functional.

(B) Moderate (Grade 2) - more muscle fibers are torn resulting in muscle pain with contraction.

(C) Severe (Grade 3) - tendons are completely disrupted, extreme pain and loss of use of muscle.

(36) Subjective complaints - report of signs or symptoms, perceivable only by the injured employee, relating to the injury and which cannot be independently verified or confirmed by recognized laboratory or diagnostic tests or signs observable by physical examination.

(37) Time limited - a specific duration of clock or calendar time which is not exceeded on a routine basis.

(38) Treating doctor - the doctor primarily responsible for the employee's health care for an injury (synonymous with the terms "primary gatekeeper" and "gatekeeper").

(39) Treatment duration - calendar time allowed for treatment for a specific level of care.

(40) Treatment plan - a written document which must contain the following components:

(A) type of intervention/treatment modality;

(B) frequency of treatment;

(C) expected duration of treatment;

(D) expected clinical response to treatment; and

(E) specification of a re-evaluation timeframe.

(41) Work conditioning - a highly structured, goal-oriented, individualized treatment program using real or simulated work activities in conjunction with conditioning tasks. Work conditioning is a single disciplinary approach.

(42) Work hardening - a highly structured, goal-oriented, individualized treatment program designed to maximize the ability of the persons served to return to work. Work hardening programs are interdisciplinary in nature with a capability of addressing the functional, physical, behavioral, and vocational needs of the injured worker. Work hardening provides a transition between management of the initial injury and return to work while addressing the issues of productivity, safety, physical tolerances, and work behaviors. Work hardening programs use real or simulated work activities in a relevant work environment in conjunction with physical conditioning tasks. These activities are used to progressively improve the biomechanical, neuromuscular, cardiovascular/metabolic, behavioral, attitudinal and vocational functioning of the persons served.

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This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711289
Susan Cory
General Counsel
Texas Workers' Compensation Commission
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 440-3700

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 114. Control of Air Pollution from Motor Vehicles

The commission proposes the repeal of Chapter 114, §§114.1, 114.3-114.7, 114.13, 114.23, 114.25, 114.27, and 114.29-114.40, concerning Control of Air Pollution From Motor Vehicles; a new Chapter 114, concerning Control of Air Pollution From Motor Vehicles, §§114.1-114.5, concerning Definitions; §114.20 and §114.21, concerning Motor Vehicle Anti-Tampering Requirements; §§114.50-114.53, concerning Vehicle Inspection and Maintenance; §114.100, concerning Oxygen Requirements for Gasoline; §§114.150-114.157, concerning Low Emission Fleet Vehicle Requirements; §§114.200-114.202, concerning Vehicle Retirement and Mobile Emission Reduction Credits; and §§114.250, 114.260, and 114.270, concerning Transportation Planning; and a proposed revision to the State Implementation Plan concerning this proposal.

EXPLANATION OF PROPOSED RULES Several new state and federal requirements for the control of air pollutants from motor vehicles must be incorporated into Chapter 114 within the next twelve months. The implementation of these requirements will require several rulemaking efforts, some of which will be on overlapping, but not necessarily simultaneous schedules.

In order to better accommodate overlapping schedules, the existing Chapter 114 must be reformatted into subchapters, each of which may then be revised independently of the others. This is accomplished by repealing the existing sections and reinserting them into new subchapters without substantial technical changes. The existing Chapter 114 sections will also be renumbered to create a cleaner, more logical organization.

The new Chapter 114 will be divided into seven new subchapters (A through G). The proposed Subchapter A, §§114.1-114.5, contains the definitions for the entire chapter. The definitions were taken from several existing sections and placed into §114.1 for general definitions and four other sections, §§114.2-114.5, which cover major mobile source program definitions. Each of the remaining six subchapters contains a specific requirement which pertains to specific motor vehicle programs. The proposed Subchapter B, §§114.20-114.21, contains the requirements for the motor vehicle anti-tampering program. The proposed new §114.20 does not contain the original subsection (e), concerning leaded gasoline, because leaded fuel has been banned for on-road sales by the FCAA beginning December 31, 1995. Proposed Subchapter C, §§114.50-114.53, contains the requirements for the vehicle inspection and maintenance program. Proposed Subchapter D, §114.100, contains the requirements for the oxygenated fuels program. Proposed Subchapter E, §§114.150-114.157, contains the requirements for the low emission fleet vehicle program. Proposed Subchapter F, §§114.200-114.202, contains the requirements for the vehicle retirement and mobile emission reduction credits program. Proposed Subchapter G, §§114.250, 114.260, and 114.270, contains the requirements for the transportation planning program. Section 114.250, concerning Memorandum of Understanding (MOU) with the Texas Department of Transportation, contains the MOU as an exhibit under subsection (c). The Mobile Source Division is planning to incorporate the MOU into Chapter 7, concerning Memoranda of Understanding, in a follow-on rulemaking.

Finally, this proposed rulemaking is a regulatory reform action which incorporates numerous editorial changes to ensure the chapter is consistent with the Guiding Principles and policies of the commission, and is consistent in format, style, and tone per commission guidelines.

FISCAL NOTE Stephen Minick, Strategic Planning and Appropriations Division, has determined that for the first five-year period these rules as proposed are in effect, there will be no significant fiscal implications for state or local government as a result of administration or enforcement of the rules. The proposed rules do not include the requirement for signs on each gasoline pump which state a prohibition on the use of leaded gasoline, because unleaded fuel has been banned for on-road sales by the FCAA since December 31, 1995. This will remove the requirement for state and local government to enforce the sign requirements for leaded gasoline. With the exception of the reduced cost to maintain the leaded gasoline signs on all gasoline pumps, there will be no additional economic impact on owners and operators of affected sources already subject to the requirements of the existing sections because the requirements themselves will not be changed.

PUBLIC BENEFIT Mr. Minick also has determined that for each year of the first five years the proposed rules are in effect the public benefit anticipated as a result of the reorganization of Chapter 114 will be a more logically organized chapter which will be able to accommodate new state and federal requirements to be incorporated in overlapping but separate rulemakings. There will be no additional anticipated economic costs to persons or small businesses required to comply with the rules as proposed, because the requirements themselves will not be changed.

TAKINGS IMPACT ASSESSMENT The commission has prepared a Takings Impact Assessment for this rule proposal under Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this rulemaking is to reorganize Chapter 114, by creating subchapters and reorganizing the sections into the new subchapters, in order to facilitate implementation of further rule revisions by the state. Promulgation and enforcement of this reorganization will not affect private real property.

COASTAL MANAGEMENT PLAN The commission has determined that the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resource Code, §§33.201 et. seq.), and the commission's rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 31 TAC §505.11(b)(2) and 30 TAC §281.45(a)(3) relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission has reviewed this proposed action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and has determined that the proposed action is consistent with the applicable CMP goals and policies. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations at Title 40, Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal area, (31 TAC §501.14(q)). This proposal does not change existing requirements which already comply with regulations at Title 40, CFR, and is therefore consistent with this policy. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

PUBLIC HEARING A public hearing on this proposal will be held in Austin on September 30, 1997 at 10:00 a.m. in Building F, Room 2210 of the commission's central office, located at 12100 North IH-35, Park 35 Technical Center, Austin, Texas 78753. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a commission staff member will be available to discuss the proposal 30 minutes prior to the hearing and will answer questions before and after the hearing.

SUBMITTAL OF COMMENTS Written comments may be mailed to Heather Evans, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments should reference Rule Log Number 97163-114-AI. Comments must be received by 5:00 p.m., October 6, 1997. For further information or questions concerning this proposal, contact Candy Garrett, Mobile Source Division, Office of Air Quality, (512) 239-1489.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearings should contact the commission at (512) 239-4900. Requests should be made as far in advance as possible.

30 TAC §§114.1, 114.3-114.7, 114.13, 114.23, 114.25, 114.27, 114.29-114.40

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Natural Resource Conservation Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The proposed repeals implement Texas Health and Safety Code, §382.017.

§114.1. Maintenance and Operation of Air Pollution Control Systems or Devices Used to Control Emissions from Motor Vehicles.

§114.3. Vehicle Emissions Inspection Requirements.

§114.4. Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers.

§114.5. Exclusions and Exceptions.

§114.6. Waivers and Extensions for Inspection Requirements.

§114.7. Inspection and Maintenance Fees.

§114.13. Oxygenated Fuels.

§114.23. Transportation Control Measures.

§114.25. Memorandum of Understanding with the Texas Department of Transportation.

§114.27. Transportation Conformity.

§114.29. Accelerated Vehicle Retirement Program.

§114.30. Definitions.

§114.31. Requirements for Mass Transit Authorities.

§114.32. Requirements for Local Governments and Private Persons.

§114.33. Use of Certain Vehicles for Compliance.

§114.34. Exceptions.

§114.35. Exceptions for Certain Mass Transit Authorities.

§114.36. Reporting.

§114.37. Record Keeping.

§114.38. Program Compliance Credits.

§114.39. Mobile Emission Reduction Credit Program.

§114.40. The Texas Mobile Emission Reduction Credit Fund.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711021

Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: November 5, 1997
For further information, please call: (512) 239–1970

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Subchapter A. Definitions

30 TAC §§114.1–114.5

The new rules are proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA because the primary purpose of this rulemaking is to reformat Chapter 114 into subchapters. Proposed Subchapter B, concerning Motor Vehicle Anti-Tampering Requirements, does not contain the leaded gasoline requirements of the former §114.1(e); therefore, Subchapter B is proposed under the TCAA, §382.011, which provides the commission with the authority to control the quality of the state's air; §382.012, which provides for the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning monitoring requirements and examinations of records; and §382.019, which provides the commission with the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles.

The proposed new rules, Subchapters A and C-G, are only a reformatting of existing rules and therefore do not implement any new state or federal requirements. The proposed Subchapter B, does not contain the leaded gasoline requirements of the former §114.1(e), and has become unnecessary due to the FCAA, §§203(a)(3) and 211(n).

§114.1. Definitions.

Unless specifically defined in the TCAA or in the rules of the Texas Natural Resource Conservation Commission (commission), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

Dual-fuel vehicle - Any motor vehicle or motor vehicle engine engineered and designed to be operated on two different fuels, but not a mixture of the two.

Emergency vehicle - A vehicle defined as an authorized emergency vehicle according to Texas Transportation Code, §541.201(1).

Emissions - The emissions of oxides of nitrogen, volatile organic compounds, carbon monoxide, particulate, or any combination of these substances.

First safety inspection certificate - Initial Department of Public Safety (DPS) certificates issued through DPS certified inspection stations for every new vehicle found to be in compliance with the rules and regulations governing safety inspections.

Gross vehicle weight rating (GVWR)- The value specified by the manufacturer as the maximum design loaded weight of a vehicle. This is the weight as expressed on the vehicle's registration, and includes the weight the vehicle can carry or draw.

Heavy-duty vehicle- Any passenger vehicle or truck capable of transporting people, equipment, or cargo, that has a GVWR greater than 8,500 lbs., and is required to be registered under the Texas Transportation Code, §502.002 . For purposes of the Mobile Emission Reduction Credit (MERC) trading program the heavy-duty class is divided into the following subclasses:

(A) Light heavy-duty vehicle - Any passenger vehicle or truck capable of transporting people, equipment, or cargo that has a GVWR greater than 8,500 lbs. but less than or equal to 10,000 lbs.

(B) Medium heavy-duty vehicle - Any passenger vehicle or truck capable of transporting people, equipment, or cargo that has a GVWR greater than 10,000 lbs. but less than or equal to 19,500 lbs.

(C) Heavy heavy-duty vehicle - Any passenger vehicle or truck capable of transporting people, equipment, or cargo that has a GVWR greater than 19,500 lbs.

Inherently low emission vehicle - A vehicle as defined by Title 40 of the Code of Federal Regulations (40 CFR), Part 88.

Law enforcement vehicle - Any vehicle controlled by a local government and primarily operated by a civilian or military police officer or sheriff, or by state highway patrols, or other similar law enforcement agencies, and which is used for the purpose of law enforcement activities including, but not limited to, chase, apprehension, surveillance, or patrol of people engaged in or potentially engaged in unlawful activities.

Light-duty vehicle - Any passenger vehicle or truck capable of transporting people, equipment, or cargo, that has a GVWR less than or equal to 8,500 lbs, and required to be registered under the Texas Transportation Code, §502.002. For purposes of the MERC trading program the light-duty class is divided into the following subclasses:

(A) Light-duty vehicle - Any passenger vehicle capable of seating 12 or fewer passengers that has a GVWR less than or equal to 6,000 lbs.

(B) Light-duty truck 1 - Any passenger truck capable of transporting people, equipment or cargo, that has a GVWR less than or equal to 6,000 lbs.

(C) Light-duty truck 2 - Any passenger truck capable of transporting people, equipment or cargo, that has a GVWR greater than 6,000 lbs. but less than 8,500 lbs.

Loaded mode inspection and maintenance (I/M) test - A measurement of the tailpipe exhaust emissions of a vehicle while the drive wheel rotates on a dynamometer, which simulates the full weight of the vehicle driving down a level roadway. Loaded test equipment specifications shall meet EPA requirements for Acceleration Simulation Mode equipment.

Low emission vehicle- A vehicle as defined by 40 CFR, Part 88.

Mass Transit Authority - A transportation or transit authority or department established under Chapter 141, Acts of the 63rd Legislature, Regular Session, 1973 as defined in the Texas Transportation Code, Chapters 451 (Metropolitan Rapid Transit Authorities), 452 (Regional Transportation Authorities), and 453 (Municipal Transportation Authorities), that operates a mass transit system under any of those laws.

Revised Texas I/M State Implementation Plan (SIP) - The portion of the Texas SIP which includes the procedures and requirements of the vehicle emissions inspection and maintenance program as adopted by the commission May 29, 1996, in accordance with the 40 CFR Part 51, Subpart S, issued November 5, 1992; the EPA flexibility amendments dated September 18, 1995; and the National Highway Systems Designation Act of 1995. A copy of the revised Texas I/M SIP is available at the Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Austin, Texas, 78753; mailing address: P.O. Box 13087, MC 166, Austin, Texas 78711-3087.

Tier I federal emission standards - The standards are defined in the FCAA as amended in §202, USC Title 42 §7521, and in 40 CFR, Part 86. The phase-in of these standards began in model year 1994.

Ultra low emission vehicle - A vehicle as defined by 40 CFR, Part 88.

Zero emission vehicle - A vehicle as defined by 40 CFR, Part 88.

§114.2. Inspection and Maintenance (I/M) Definitions.

Unless specifically defined in the TCAA or in the rules of the Texas Natural Resource Conservation Commission (commission), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in this Subchapter C of this chapter (relating to Vehicle Inspection and Maintenance), shall have the following meanings, unless the context clearly indicates otherwise:

Adjusted annually - Percentage, if any, by which the Consumer Price Index (CPI) for the preceding calendar year differs (as of August 31) from the CPI for 1989; adjustments shall be effective on January 1 of each year.

Basic program area - Collin, Dallas, Denton, and Tarrant Counties.

Core program area - Dallas, El Paso, Harris, and Tarrant Counties.

Emissions tune-up - A basic tune-up along with functional checks and any necessary replacement or repair of emissions control components.

Enhanced program areas - Harris, Waller, Galveston, Montgomery, Chambers, Liberty, Fort Bend, Brazoria, and El Paso Counties.

Motorist - A person or other entity responsible for the inspection, repair, and maintenance of a motor vehicle, which may include, but is not limited to, owners and lessees.

On-road test - Utilization of remote sensing technology to identify vehicles operating within the core I/M program area that have a high probability of being high-emitters.

Out-of-cycle test - Required emissions test not associated with vehicle safety inspection testing cycle.

Primarily operated - Use of a motor vehicle greater than 60 calendar days per testing cycle in a county. Motorists shall comply with emissions requirements for such county. It is presumed that a vehicle is primarily operated in the county which it is registered.

Program area - County or counties in which the Texas Department of Public Safety, in coordination with the commission, administers the vehicle emissions inspection and maintenance program contained in the revised Texas I/M State Implementation Plan. These counties include Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Harris, Galveston, Liberty, Montgomery, Tarrant, and Waller.

Retests - Successive vehicle emissions inspections following the failing of an initial test by a vehicle during a single testing cycle.

Testing cycle - Annual or biennial cycle commencing with the first safety inspection certificate expiration date for which a motor vehicle is subject to a vehicle emissions inspection.

Two-speed idle I/M test - A measurement of the tailpipe exhaust emissions of a vehicle while the vehicle idles, first at a lower speed and then again at a higher speed.

Uncommon part - A part that takes more than 30 days for expected delivery and installation, where a motorist can prove that a reasonable attempt made to locate necessary emission control parts by retail or wholesale part suppliers will exceed the remaining time prior to expiration of the vehicle safety inspection certificate or the 30 day period following an out-of-cycle inspection.

§114.3. Low Emission Fleet Vehicle Definitions.
Unless specifically defined in the TCAA or in the rules of the Texas Natural Resource Conservation Commission (commission), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in Subchapter E of this chapter (relating to Low Emission Fleet Vehicle Requirements), shall have the following meanings, unless the context clearly indicates otherwise:

Beaumont/Port Arthur nonattainment area - Hardin, Jefferson, and Orange Counties.

Capable of being centrally fueled - A fleet or that part of a fleet consisting of vehicles that could be refueled 100% of the time at a location that is owned, operated, or controlled by the fleet operator or that is under contract with the fleet operator. The fact that one or more vehicles in a fleet are not centrally fueled does not exempt an entire fleet from the program.

Capable of operating - Having the necessary permanently installed equipment that enables a vehicle to use a specified fuel.

Centrally fueled- A fleet or that part of a fleet consisting of vehicles that are refueled 100% of the time at a location that is owned, operated, or controlled by the fleet operator or that is under contract with the fleet operator. The fact that one or more vehicles in a fleet are not centrally fueled does not exempt an entire fleet from the program. The term does not include retail credit card purchases or commercial fleet card purchases.

Certified- The process established by the EPA to ensure compliance, throughout the entire useful life of a vehicle, with the required standards as defined in Title 40 Code of Federal Regulations (40 CFR).

Clean-fuel vehicle - A vehicle in a class or category of vehicles that has been certified to meet for any model year:

(A) the clean-fuel vehicle standards applicable under the FCAA as amended Part C, Subchapter II, (U.S.C. 42 §§7581 et seq.);

(B) emission limits at least as stringent as the applicable low-emission vehicle standards for the clean-fuel fleet program under 40 CFR, §§ 88.104-94, 88.105-94, and as published in the *Federal Register* of September 30, 1994; and

(C) vehicles certified to the inherently low-emission vehicle standards under 40 CFR, §§88.311-93 as published in the *Federal Register,* March 1, 1993, will also be considered clean-fuel vehicles.

Control -

(A) When it is used to join all entities under common management, means any one or a combination of the following:

(i) a third person or firm has equity ownership of 51% or more in each of two or more firms;

(ii) two or more firms have common corporate officers, in whole or in substantial part, who are responsible for the day-to-day operation of the companies;

(iii) one firm leases, operates, supervises, or in 51% or greater part owns equipment and/or facilities used by another person or firm, or has equity ownership of 51% or more of another firm.

(B) When it is used to refer to the management of vehicles, means a person has the authority to decide who can operate a particular vehicle, and the purposes for which the vehicle can be operated.

(C) When it is used to refer to the management of people, means a person has the authority to direct the activities of another person or employee in a precise situation, such as the workplace.

Conventional vehicle - A vehicle which meets all applicable federal emission standards in place at the time of manufacture but is not certified as a clean-fuel vehicle.

Dallas/Fort Worth nonattainment area - Collin, Dallas, Denton, and Tarrant Counties.

El Paso nonattainment area - El Paso County.

Fleet - all vehicles that are owned, operated, or controlled by an affected entity and are registered under the Texas Transportation Code, §502.002 and operated primarily within any one nonattainment area.

Fleet vehicle - A vehicle required to be registered under the Texas Transportation Code, §502.002, and that is centrally fueled, capable of being centrally fueled, or fueled at facilities serving both business customers and the general public. The term does not include:

(A) a fleet vehicle that, when not in use, is normally parked at the residence of the individual who usually operates it and that is available to such individual for personal use;

(B) a fleet vehicle that, when not in use, is normally parked at the residence of the individual who usually operates it and who does not report to a central location; or

(C) a fleet vehicle that has a gross vehicle weight rating (GVWR) greater than 26,000 pounds except vehicles owned or operated by mass transit authorities.

Houston/Galveston nonattainment area - Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

Lessor - A person who leases or rents vehicles to other entities for the purpose of short-term rental or an extended term leasing (with or without maintenance), without a driver, under a contract. Fleets that are owned, operated, or controlled by lessors for operations other than lease or rental to other entities may be subject to the requirements of this chapter.

Local government - A city, county, municipality, or political subdivision of a state. This term does not include school districts.

Mobile emission reduction credit - The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and

state regulations) emission reduction generated by a mobile source as set forth in §114.201 and §114.202 of this title (relating to the Mobile Emission Reduction Credit Program, and The Texas Mobile Emission Reduction Credit Fund) and which has been banked in accordance with §101.29 of this title (relating to Emissions Banking and Trading).

Non-road vehicle- A vehicle which is not registered under the Texas Transportation Code, §502.002.

Operate - Use of a vehicle on any public road.

Operates primarily - Use of a fleet in any one affected nonattainment area more than 50% of the average annual vehicle miles traveled or operating time as documented by the affected entity from July 1 through June 30th of each year.

Own- Having legal title to a vehicle.

Private person- Any individual, partnership, firm, company, business trust, corporation, organization, or association which owns, operates, or controls a fleet.

Program compliance credits - Credits that may be granted to a vehicle owner/operator who exceeds the clean-fuel vehicle provisions and requirements of this chapter.

Public works agency- A governmental body established by the legislative branch, including municipalities and counties acting by ordinance, charged with administrating the construction and maintenance of improvements constructed with public funds for public use, protection, or enjoyment, and those who oversee provision of public services.

Vehicle - A self propelled device designed to operate with four or more wheels in contact with the ground, in or by which a person or property is or may be transported, and which is registered under the Texas Transportation Code, §502.002.

§114.4. Vehicle Retirement and Mobile Emission Reduction Credit Definitions.

Unless specifically defined in the TCAA or in the rules of the Texas Natural Resource Conservation Commission (commission), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in Subchapter F of this chapter (relating to Vehicle Retirement and Mobile Emission Reduction Credits), shall have the following meanings, unless the context clearly indicates otherwise:

Area wide fleet - All the automobiles and light duty trucks covered under the Texas Inspection and Maintenance program as set forth in §114.50 of this title (relating to the Vehicle Emission Inspection and Maintenance program) in the ozone nonattainment area.

High-emitting vehicle - A vehicle that fails the Texas Inspection and Maintenance emission test.

Dealer - The entity that locates the potential scrappage vehicles, purchases the vehicles, sells the mobile source emission reduction credits, and initiates the proper recycling and reclamation of the vehicle by a scrapper; the broker or middleman that may exist between the scrappage sponsor and the scrapper.

Mobile Source Emission Reduction Credit (MERC) - The credit obtained from an enforceable, permanent, quantifiable, and surplus (to other federal and state regulations) emission reduction that results from the permanent removal of a high-emitting vehicle from the area wide vehicle fleet and which has been banked in accordance with §101.29 of this title (relating to Emissions Banking and Trading).

On testing cycle - The vehicle's required emission test is within the six months preceding the deadline for emission testing and vehicle registration under the Texas Inspection and Maintenance program. The 18 months following the vehicle registration expiration date are the off cycle months.

Recycling - Refer to the Code of Federal Regulations, Title 40, §261.1.

Replacement vehicle - The vehicle the motorist is assumed to drive after his/her original vehicle is sold to a scrapper. The replacement vehicle is equal to the average fleet vehicle for that ozone nonattainment area as calculated from the most current auto registrations and the most recent version of the EPA MOBILE Model.

Scrappage sponsor - Any organization that funds the purchase of high-emitting vehicles for the purpose of obtaining mobile source emission reduction credits. The sponsor and the dealer can be the same enterprise.

Scrappage vehicle - An automobile or light-duty truck in the area wide fleet that is sold or will be sold to a scrapper for recycling and reclamation.

Scrapper - The entity, such as a salvage yard, automotive dismantler, or parts recycler, that recycles and reclaims the scrappage vehicle under the Accelerated Vehicle Retirement program. The scrapper can also purchase the vehicle from the motorist, making the scrapper and the dealer the same enterprise. Each scrapper shall be certified by the commission in accordance with §114.200(d) of this title (relating to Accelerated Vehicle Retirement Program).

Stationary source (applies only to nonattainment area, new source review rules under FCAA provisions) - Any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the FCAA.

§114.5. Transportation Planning Definitions.

Unless specifically defined in the TCAA or in the rules of the Texas Natural Resource Conservation Commission (commission), the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, the following words and terms, when used in Subchapter G of this chapter (relating to Transportation Planning), shall have the following meanings, unless the context clearly indicates otherwise:

Implementing agency - An entity, transportation provider, organization, agency, or individual responsible for the design, procurement of funds, construction, operation, maintenance, management, monitoring, and, in conjunction with the metropolitan planning organization, compliance with transportation control measures.

Metropolitan Planning Organization- As defined under the Intermodal Surface Transportation Efficiency Act, Title 23, §134.

Transportation Control Measure - Any category or group of actions, programs, or transportation services or facilities which reduce on-road mobile source emissions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711012
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: November 5, 1997
For further information, please call: (512) 239–1970

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Subchapter B. Motor Vehicle Anti-Tempering Requirements

30 TAC §114.20, §114.21

The new rules are proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA because the primary purpose of this rulemaking is to reformat Chapter 114 into subchapters. Proposed Subchapter B, concerning Motor Vehicle Anti-Tampering Requirements, does not contain the leaded gasoline requirements of the former §114.1(e); therefore, Subchapter B is also proposed under the TCAA, §382.011, which provides the commission with the authority to control the quality of the state's air; §382.012, which provides for the commission to prepare and develop a general, comprehensive plan for the proper control of the state's air; §382.016, concerning monitoring requirements and examinations of records; and §382.019, which provides the commission with the authority to adopt rules to control and reduce emissions from engines used to propel land vehicles. .

The proposed Subchapter B does not contain the leaded gasoline requirements of the former §114.1(e), and therefore implements the provisions of the FCAA, §203(a)(3) and §211(n).

§114.20. Maintenance and Operation of Air Pollution Control Systems or Devices Used to Control Emissions from Motor Vehicles.

(a) Any person owning or operating any motor vehicle or motor vehicle engine on which is installed or incorporated a system or device used to control emissions from the motor vehicle in compliance with federal motor vehicle rules shall maintain the system or device in good operable condition and shall use it at all times that the motor vehicle or motor vehicle engine is operated.

(b) No person may remove or make inoperable any system or device used to control emissions from a motor vehicle or motor vehicle engine or any part thereof, except where the purpose of removal of the system or device, or part thereof, is to install another system or device, or part thereof, which is equally effective in reducing emissions from the vehicle. Acceptable removal and/or installation practices include:

(1) Replacement of the engine of a vehicle if:

(A) the design of the replacement engine has received prior approval of the EPA;

(B) the design of the replacement engine is compatible with the vehicle chassis such that all applicable pollution control systems and devices are properly installed and operable; and

(C) the resulting vehicle is identical, with regard to all emission-related parts and emission-related engine design parameters and calibrations, to the same or a newer model year vehicle, as originally equipped.

(2) Replacement of a catalytic converter on a vehicle if:

(A) the replacement catalyst is an original equipment manufacturer's catalyst or an aftermarket catalyst accepted by EPA; and

(B) conformance with subparagraph (A) of this paragraph is documented during the inspection of the vehicle, or upon request.

(3) Installation of conversion equipment to allow the use of an approved alternative fuel, if the conversion kit components are recognized by the Texas Railroad Commission as complying with applicable safety requirements.

(4) Replacement or installation of any other system or device if:

(A) the system or device can be demonstrated to be at least as effective in reducing emissions as the original equipment; and

(B) conformance with subparagraph (A) of this paragraph is documented, upon request.

(c) No person may sell, offer for sale, lease, or offer to lease in the State of Texas any motor vehicle unless all of the following conditions are met:

(1) The motor vehicle shall be equipped with either the control systems or devices that were originally a part of the motor vehicle or motor vehicle engine or an alternate control system or device as designated in subsection (b) of this section.

(2) The control systems or devices required in paragraph (1) of this subsection shall be in good operable condition.

(3) A notice of the prohibition and requirements of this subsection shall be displayed at all commercial motor vehicle sales facilities, vehicle consignment lots, and other businesses in Texas which sell, offer for sale, lease, or offer to lease more than three used vehicles per year. The notice shall be displayed in a conspicuous and prominent location near each customer entrance way and in each sales or lease office. The notice shall read, "State law prohibits any person from selling, offering for sale, leasing, or offering to lease any vehicle not equipped with all emission control systems or devices in good operable condition. Violators are subject to penalties under the TCAA of up to $25,000 per violation." This notice shall be no smaller than 8 inches by 10 inches (20.32 cm by 25.4 cm) and shall be clearly visible to all customers.

(d) Any part or component of an air pollution control system or device of a motor vehicle or motor vehicle engine equipped with such air pollution control system or device in compliance with federal motor vehicle rules shall not be replaced with a different part or component unless such part or component is designated as a replacement for the specific make and model of the vehicle or vehicle engine.

(e) No person may sell, offer for sale, or use any system or device which circumvents or alters any system, device, engine, or any part thereof, installed by a vehicle manufacturer to comply with the Federal Motor Vehicle Control Program during actual in-use operation of a motor vehicle on Texas roadways. A notice of the

prohibitions and requirements of this subsection shall be displayed at all motor vehicle parts, supply, repair, alternative fuel conversion, or other vehicle service facilities in Texas which sell, offer for sale, install, or offer to install any vehicle emission control, exhaust system or device, aftermarket alternative fuel conversion, or engine. The notice shall be displayed in a prominent and conspicuous location near each consumer entrance way and service counter. The notice shall read: "State law prohibits any person from selling, offering for sale, or using any system or device for the purpose of circumventing the emission control device on a vehicle or vehicle engine. State law also prohibits any person from removing or disconnecting any part of the emission control system of a motor vehicle, except to install replacement parts which are equally effective in reducing emissions. Violators are subject to penalties under the TCAA of up to $25,000 per violation." This notice shall be no smaller than 8 by 10 inches (20.32 cm by 25.4 cm) and shall be clearly visible to all customers.

§114.21. Exclusions and Exceptions.

(a) The following exemptions shall apply to specified motor vehicles or motor vehicle engines:

(1) Motor vehicles or motor vehicle engines which are registered as farm vehicles with the Motor Vehicle Division of the Texas Department of Highways and Public Transportation and are intended solely or primarily for use on a farm or ranch; or are intended solely or primarily for legally sanctioned motor competitions, for research and development uses, or for instruction in a bona fide vocational training program where the use of a system or device would be detrimental to the purpose for which the vehicle or engine is intended to be used are exempt from the provisions of §114.20(a), (b), and (d) of this title (relating to Maintenance and Operation of Air Pollution Control Systems or Devices Used to Control Emissions From Motor Vehicles).

(2) Motor vehicles or motor vehicle engines intended solely or primarily for research and development uses, or for instruction in a bona fide vocational training program where the introduction of leaded gasoline or the circumvention of an emission control system or device is necessary for the intended purposes of the program are exempt from the provisions of §114.20(e) of this title.

(b) Vehicles belonging to members of the U.S. Department of Defense (DoD) participating in the DoD Privately Owned Vehicle Import Program or other persons being transferred to a foreign country are exempt from the provisions of §114.20(a), (b), and (d) of this title if the following conditions are met:

(1) Only the catalytic converter, oxygen sensor, and/or the fuel filler inlet restrictor are removed from the vehicle.

(2) The vehicle is delivered to the appropriate port for overseas shipment within 30 days after the emission control device(s) is removed.

(3) If the vehicle is returned to the United States, all systems or devices used to control emissions from the vehicle are restored to good operable condition within 30 days of pick-up of the vehicle from the appropriate port of importation.

(4) Documentation shall be kept with the vehicle at all times while the vehicle is operated in Texas which provides sufficient information to demonstrate compliance with all appropriate qualifications and conditions of this exemption, including the following:

(A) the unique vehicle identification number (VIN) of the subject vehicle;

(B) the agency, company, or organization which employs the owner of the subject vehicle;

(C) the country to which the owner of the subject vehicle is being transferred;

(D) the dates when applicable alterations were performed on the subject vehicle;

(E) the date when the subject vehicle is scheduled to be delivered to the appropriate port for shipment out of the United States; and

(F) the date when the subject vehicle is picked up from the port of importation upon returning to the United States.

(c) Any person owning or operating a motor vehicle or motor vehicle engine may apply to the executive director for an exclusion from the provisions of §114.20(a) and (b) of this title. Such an exclusion may be granted if the following conditions are met.

(1) The application shall include the applicant's full name, business address, and telephone number. A single vehicle and vehicle engine shall be specified in the application and must be identified by the unique vehicle identification number assigned to that vehicle by the manufacturer and by the manufacturer's engine family number.

(2) The air pollution control systems or devices on the vehicle or vehicle engine which would be covered by the exclusion shall be specified in the application.

(3) A demonstration shall be made in the application that provides adequate justification for special consideration of the specified vehicle under the provisions of this chapter. This demonstration shall include, but shall not be limited to, the following information necessary to determine that the use of certain pollution control devices or systems on the vehicle to be covered by the exclusion would result in a clear danger to persons or property or would be detrimental to the purpose for which the vehicle is intended to be used.

(A) Proposed use of the vehicle and description of adverse circumstances;

(B) Locations where the vehicle will primarily be operated;

(C) Estimated length of time the vehicle is expected to be operated in adverse circumstances;

(D) Estimated percentages of the time the vehicle will primarily be operated in adverse circumstances and on public roadways;

(E) History of problems related to the use of specified control devices or systems;

(F) Evidence of the potential hazards and consequences of operating the vehicle for the intended use with the identified control devices or systems in place.

(4) The applicant shall agree and ensure that a copy of the exclusion shall be kept with the vehicle at all times and shall be available for inspection by representatives of the Texas Natural Resource Conservation Commission, the Texas Department of Public Safety (DPS), or any other law enforcement agency upon request. The

approved exclusion shall also be presented to the certified vehicle inspector before each annual vehicle safety inspection of the vehicle as administered by the DPS.

(5) The applicant shall agree and ensure that the exclusion shall be void and all pollution control systems and devices replaced on the vehicle and/or engine covered by the exclusion when the vehicle changes ownership or is no longer used for the purpose identified in the exclusion application. The executive director shall be informed in writing prior to the change of ownership or usage.

(6) The applicant shall comply with all special provisions and conditions specified by the executive director in the exclusion.

(d) The following vehicle transactions involving "wholesale dealers" and "retail dealers" as defined in the Texas Dealer Law, Article 6686, Vernon's Texas Civil Statutes, Title 43, Texas Administrative Code, are exempt from the requirements of §114.20(c) of this title:

(1) sales or transfers from one vehicle wholesale dealer to another;

(2) sales or transfers from a vehicle wholesale dealer to a vehicle retail dealer;

(3) sales, transfers, or trade-ins from an individual to a vehicle wholesale or retail dealer;

(4) sales or transfers from one retail dealer to another retail dealer; and

(5) sales or transfers from a retail dealer to a wholesale dealer.

(e) Federal, state, and local agencies or their agents which sell abandoned, confiscated, or seized vehicles and any commercial vehicle auction facilities are exempt from the provisions of §114.20(c) of this title if the following conditions are met.

(1) The DPS motor vehicle safety inspection certificates must be removed from the vehicle and destroyed before the vehicle may be offered for sale or displayed for public examination.

(2) All potential buyers of the vehicle must be informed that deficiencies may be present in the vehicle pollution control systems on the vehicle. The buyer must also be informed of the liabilities to the buyer under §114.20 of this title and §114.50 of this title (relating to Inspection Requirements) of operating the vehicle prior to the adequate restoration of all pollution control systems or devices on the vehicle as originally equipped. The seller of the vehicle shall provide to the buyer a written acknowledgment of the receipt of this information which must be signed by the buyer prior to completion of the sales transaction. The seller shall retain a copy of this signed acknowledgment and shall make it available, upon request.

(f) The owner of a motor vehicle which has been totally disabled by accident, age, or malfunction and which will no longer be operated is exempt from the provisions of §114.20(c) of this title if the DPS motor vehicle safety inspection certificate is removed and destroyed before the vehicle is offered for sale or displayed for public examination.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711013
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: November 5, 1997
For further information, please call: (512) 239–1970

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Subchapter C. Vehicle Inspection and Maintenance

30 TAC §§114.50–114.53

The new rules are proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The proposed new rules are only a reformatting of existing rules and therefore do not implement any new state or federal requirements.

§114.50. Vehicle Emissions Inspection Requirements.

(a) Applicability. The requirements of this section and those contained in the revised Texas Inspection and Maintenance (I/M) State Implementation Plan (SIP) shall be applied to model years 24 years and newer of gasoline-powered motor vehicles, excluding motorcycles and dual-fueled vehicles which cannot be operated using gasoline, and safety inspection facilities and inspectors certified by the Texas Department of Public Safety (DPS) to inspect vehicles, in the program areas in accordance with the following schedule:

(1) annual or biennial emissions inspection of vehicles registered and primarily operated in Dallas and Tarrant Counties beginning on July 1, 1996, beginning with the first safety inspection certificate expiration date;

(2) annual or biennial emissions inspection of vehicles registered and primarily operated in Harris County beginning on January 1, 1997, beginning with the first safety inspection certificate expiration date;

(3) annual emissions inspection of vehicles registered and primarily operated in El Paso County beginning on January 1, 1997, beginning with the first safety inspection certificate expiration date; and

(4) on-road tests of vehicles registered in a program area and operating in a core program area beginning on September 1, 1997.

(b) Control requirements.

(1) No person may operate any motor vehicle which does not comply with:

(A) all applicable air pollution emissions control related requirements included in the annual vehicle safety inspection requirements administered by DPS, as evidenced by a current valid inspection certificate affixed to the vehicle windshield; and

(B) the vehicle emissions inspection and maintenance requirements contained in the revised Texas I/M SIP.

(2) No person or entity may own, operate, or allow the operation of a vehicle registered in a program area, unless the vehicle has complied with all applicable vehicle emissions I/M requirements contained in the revised Texas I/M SIP.

(3) All federal government agencies shall require a motor vehicle operated by any federal government agency employee on any property or facility under the jurisdiction of the agency and located in a program area to comply with all vehicle emissions I/M requirements contained in the revised Texas I/M SIP. Commanding officers or directors of federal facilities shall certify annually to the executive director that all subject vehicles have been tested and are in compliance with the FCAA. This requirement shall not apply to visiting agency, employee, or military personnel vehicles as long as such visits do not exceed 60 calendar days per year.

(4) Any motorist in an enhanced program area who has received a notice from an emissions inspection station that there are recall items unresolved on their motor vehicle should furnish proof of compliance with the recall notice prior to having their vehicle emissions inspection for their next testing cycle. The motorist may present a written statement from the dealership or leasing agency indicating that emissions repairs have been completed as proof of compliance.

(5) A motorist whose vehicle has failed an emissions test may request a challenge retest through DPS. If the retest is conducted within 15 days of the initial inspection, the retest is free.

(6) A motorist whose vehicle has failed an emissions test and has not requested a challenge retest or has failed a challenge retest must have emissions-related repairs performed and must submit a properly completed Vehicle Repair Form (VRF) in order to receive a retest, a minimum expenditure waiver, or a parts availability time extension.

(7) A motorist whose vehicle is registered in a program area and has failed an on-road test administered by the DPS shall:

(A) submit the vehicle for an out-of-cycle vehicle emissions inspection within 30 days of written notice by the DPS; and

(B) satisfy all inspection, extension, or waiver requirements of the vehicle emissions I/M program contained in the revised Texas I/M SIP within 60 days of written notice by the DPS.

(8) State, governmental, and quasi-governmental agencies which fall outside the normal registration or inspection process shall be required to comply with all vehicle emissions I/M requirements contained in the Texas I/M SIP for vehicles primarily operated in I/M program areas.

(c) Waivers and extensions. A motorist may apply to the DPS for a waiver or an extension as specified in §114.52 of this title (relating to Waivers and Extensions for Inspection Requirements), which defer the need for full compliance with vehicle emissions standards for a specified period of time after failing a vehicle emissions inspection.

(d) Biennial testing. If a vehicle has passed a loaded mode I/M test, the vehicle is exempt from the emissions testing requirement for the following year. This does not include out-of-cycle tests.

(e) Prohibitions.

(1) No person may issue or allow the issuance of a vehicle inspection report (VIR), as authorized by DPS, unless all applicable air pollution emissions control related requirements of the annual vehicle safety inspection and the vehicle emissions I/M requirements and procedures contained in the revised Texas I/M SIP are completely and properly performed in accordance with the rules and regulations adopted by DPS and the commission. Prior to taking any enforcement action regarding this provision, the commission shall consult with DPS.

(2) No person may allow or participate in the preparation, duplication, sale, distribution, or use of false, counterfeit, or stolen safety inspection certificates, VIRs, VRFs, vehicle emissions repair documentation, or other documents which may be used to circumvent the vehicle emissions I/M requirements and procedures contained in the revised Texas I/M SIP.

(3) No organization, business, person, or other entity may represent itself as an emissions inspector certified by the DPS, unless such certification has been issued under the certification requirements and procedures contained in the revised Texas I/M SIP.

(4) No person may act as or offer to perform services as a Recognized Emissions Repair Technician of Texas, (as defined in this section), without first obtaining and maintaining DPS recognition.

(f) Requirements for Recognized Emissions Repair Technician of Texas.

(1) The following requirements must be met before DPS recognition:

(A) demonstration to the National Institute of Automotive Service Excellence (ASE) of a minimum of three years of full-time automotive repair service experience;

(B) certification in the following four tests offered by the ASE: Engine Repair (Test A1), Electrical Systems (Test A6), Engine Performance (Test A8), and beginning January 1, 1998 Advanced Engine Performance Specialist (Test L1);

(C) notification by DPS that verification of certification by the National Institute of Automotive Service Excellence is completed; and

(D) any other demonstration required by DPS rule.

(2) A Recognized Emissions Repair Technician shall perform the following duties:

(A) certify the emissions related repairs on the VRF form to be submitted to the DPS;

(B) complete and certify the VRF form for customers;

(C) notify the DPS in writing within 14 days of changes in the technician's ASE testing status.

(g) Certified Emissions Inspection Station Requirements. The following requirements must be met for DPS certification to be issued and renewed:

(1) meet all requirements established by DPS rules and regulations;

(2) purchase or lease emissions testing equipment that has been certified as specified in §114.51 of this title (relating to Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers);

(3) have a dedicated phone line for each vehicle exhaust gas analyzer to be used to inspect vehicles;

(4) enter a business arrangement with the Texas Data Link contractor to obtain a telecommunications link to the Texas Data Link System Vehicle Identification Database for each vehicle exhaust gas analyzer to be used to inspect vehicles;

(5) for inspection stations using equipment conditionally approved under §114.51(f)(1) of this title, the inspection station must have the equipment ordered from the manufacturer by June 30, 1996 in order to operate using the conditional approval; and

(6) for inspection stations using equipment conditionally approved under §114.51(f)(1) of this title, remit to the Texas Data Link contractor the amount of $.88 for each test conducted prior to securing a telecommunications link to the Texas Data Link System Vehicle Identification Database.

§114.51. Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers.

(a) Any manufacturer or distributor of vehicle testing equipment may apply to the executive director of the Texas Natural Resource Conservation Commission (commission) or his appointee, for approval of an exhaust gas analyzer or analyzer system for use in the Texas Inspection and Maintenance (I/M) program administered by the Texas Department of Public Safety. Each manufacturer shall submit a formal certificate to the commission stating that any analyzer sold or leased by the manufacturer or its authorized representative for use in the I/M program will satisfy all design and performance criteria set forth in "Specifications for Preconditioned Two Speed Idle Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Motorist's Choice Vehicle Emissions Testing Program," dated April 26, 1996. Copies of this document are available at the commission's Central Office, located at 12100 Park 35 Circle, Austin, Texas 78753. The manufacturer shall also provide sufficient documentation to demonstrate conformance with these criteria including a complete description of all hardware components, the results of appropriate performance testing, and a point-by-point response to each specific requirement.

(b) All equipment shall be tested by an independent test laboratory. The cost of the certification shall be absorbed by the manufacturer. The conformance demonstration shall include, but is not limited to:

(1) certification that equipment design and construction conforms with the specifications referenced in subsection (a) of this section;

(2) documentation of successful results from appropriate performance testing;

(3) evidence of necessary changes to internal computer programming, display format, and data recording sequence;

(4) a commitment to fulfill all maintenance, repair, training, and other service requirements described in the specifications referenced in subsection (a) of this section. A copy of the minimum warranty agreement to be offered to the purchaser of an approved vehicle exhaust gas analyzer shall be included in the demonstration of conformance; and

(5) documentation of communication ability using protocol provided by the commission or the commission Texas Data Link contractor.

(c) If a review of the demonstration of conformance and all related support material indicates compliance with the criteria listed in subsections (a) and (b) of this section, the executive director or his appointee may issue a notice of approval to the analyzer manufacturer which endorses the use of the specified analyzer or analyzer system in the Texas I/M program.

(d) The applicant shall comply with all special provisions and conditions specified by the executive director or his appointee in the notice of approval.

(e) Any manufacturer or distributor which receives a notice of approval from the executive director or his appointee for a vehicle exhaust gas analyzer for use in the Texas I/M program may be subject to appropriate enforcement action and penalties prescribed in the TCAA or the rules and regulations promulgated thereunder if:

(1) Any information included in the conformance demonstration as required in subsection (b) of this section is misrepresented resulting in the purchase or operation of equipment in the Texas I/M program which does not meet the specifications referenced in subsection (a) of this section, or

(2) The applicant fails to comply with any requirement or commitment specified in the notice of approval issued by the executive director or implied by the representations submitted by the applicant in the conformance demonstration required by subsection (b) of this section.

(f) The executive director may issue conditional notice of approval for an analyzer which does not meet every requirement of subsections (a) and (b) of this section in accordance with the following schedule and stipulations:

(1) For the purpose of phasing in the program, the executive director or his appointee may issue to the analyzer manufacturer a notice of approval which endorses the use of the specified analyzer system during the month of July 1996 in the Texas I/M program conditional upon the equipment meeting subsections (a) and (b) of this section by July 31, 1996.

(2) For use in a pilot program, the executive director or his appointee may issue to the analyzer manufacturer a notice of approval which endorses the use of the specified analyzer system prior to October 31, 1996 in the Texas I/M program conditional upon the equipment meeting subsections (a) and (b) of this section by October 31, 1996.

§114.52. Waivers and Extensions for Inspection Requirements.

(a) Applicability. The waivers and extensions apply to any motorist who can satisfy the conditions of a specific waiver or extension. Applications must be made to the Department of Public Safety (DPS). For the minimum expenditure waiver, individual vehicle waiver, and parts availability time extension, the motorist may apply only once for each testing cycle. For the low income time extension, the motorist may apply every other test cycle.

(b) Minimum expenditure waiver. A motorist shall use any available warranty coverage to obtain needed repairs before expenditures shall be used in calculating the minimum repair expenditures to qualify for a minimum expenditure waiver, unless the warranty remedy has been denied in writing from the manufacturer or authorized dealer. A motorist may not use or attempt to use expenditures for tampering-related repairs in calculating the minimum repair expenditures to qualify for a minimum expenditure waiver. A minimum

expenditure waiver shall be valid for the remaining portion of the testing cycle. Tampering includes, but is not limited to, engine modifications, emissions system modifications, or fuel-type modifications disapproved by the Texas Natural Resource Conservation Commission or EPA. A minimum expenditure waiver may be granted in accordance with the following conditions:

(1) The applicant must have a valid retest Vehicle Inspection Report (VIR), a valid Vehicle Repair Form (VRF), and the vehicle must have failed a retest after all qualifying repairs. Qualifying repairs must meet the following conditions:

(A) The minimum expenditure shall be:

(i) at least $300 until December 31, 1997 and beginning January 1, 1998 a minimum of $450, adjusted annually, in enhanced program areas; or

(ii) at least $75 for pre-1981 model year vehicles and at least $200 for 1981 and later model year vehicles in basic program areas;

(B) After January 1, 1997, for 1981 and newer model year vehicles, all qualifying repairs shall be performed by a Recognized Emissions Repair Technician of Texas in order to count labor cost and/or diagnostic costs;

(C) Qualifying repairs must be directly applicable to the cause for the test failure (repairs conducted up to 60 days prior to the initial test may count towards the waiver amount); and

(D) After January 1, 1997, when repairs are not performed by a Recognized Emissions Repair Technician of Texas, only the purchase price of parts, applicable to the failure, qualify as a repair expenditure for the minimum expenditure waiver.

(2) The motorist provides to the DPS an original retest VIR, a properly completed VRF, and an original itemized receipt indicating the emissions-related repairs performed. If labor and/or diagnostic charges are being claimed towards the minimum expenditure, the VRF shall be completed by a Recognized Emissions Repair Technician of Texas after January 1, 1997.

(c) Low income time extension. A low income time extension may be granted in accordance with the following conditions:

(1) A motorist must supply proof that the subject vehicle failed the initial emissions inspection test in the form of an original failed vehicle inspection report.

(2) A motorist shall provide proof in writing to the DPS that the registered vehicle owner(s) meets the following conditions:

(A) the low income time extension applicant is the owner of the vehicle that has failed an inspection and maintenance (I/M) test; and

(B) the vehicle has not been granted a low income time extension waiver in the previous inspection cycle; and

(C) the applicant meets one of the following:

(i) the applicant receives financial assistance from the Texas Department of Human Services (subject to approval by the director of DPS); or

(ii) the applicant's adjusted gross income is within the current federal poverty income guidelines.

(D) the applicant shows proof of conformity with paragraph (2)(C) of this subsection by providing to the DPS one of the following, which the applicant certifies are true and correct:

(i) a federal income tax return; or

(ii) other documentation authorized by the director of the DPS.

(3) After a motorist receives an initial low income time extension, the vehicle must pass an emissions test prior to receiving another low income time extension or any waiver or extension.

(d) Parts availability time extension. The parts availability time extension does not exempt the vehicle from the compliance requirements of the I/M program but merely extends the period for compliance. By the end of the time extended, the vehicle must be repaired, retested, and receive a passing VIR or comply with paragraph (4) of this subsection. Only one parts availability time extension is allowed in each test cycle for each vehicle. A parts availability time extension may be granted in accordance with the following conditions:

(1) The motorist can document that emissions-related repairs cannot be completed before the expiration of the safety inspection certificate or before the 30-day period following an out-of-cycle inspection because the repairs require an uncommon part;

(2) The motorist shall provide to the DPS an original VIR indicating that the vehicle failed the emissions test and an original itemized documentation by a Recognized Emissions Repair Technician of Texas (after January 1, 1997), indicating parts ordered by name; description and catalog number; order number; source of parts, including address and phone number; and expected delivery and installation dates of uncommon parts before a parts availability time extension can be issued.

(3) The motorist shall return the motor vehicle to the DPS for a retest and verification of repairs upon completion of the repairs.

(4) The motorist shall provide to the DPS, prior to expiration of a parts availability time extension, adequate documentation that one of the following conditions exists:

(A) the motor vehicle passed a retest;

(B) the motorist qualifies for a Minimum Expenditure Waiver or Low Income Time Extension; or

(C) the motor vehicle shall no longer be operated in the program area.

(5) A vehicle which receives a parts availability time extension in one test cycle must have the vehicle repaired and retested prior to the expiration of such extension or the vehicle shall be ineligible for a parts availability time extension in the subsequent test cycle in addition to other penalties authorized for non-compliance.

(6) The length of a parts availability time extension shall depend upon expected delivery and installation dates of uncommon parts as determined by the DPS representative on a case by case basis and issued for either 30, 60, or 90 days or longer if necessary, but shall not exceed one test cycle.

(e) Individual vehicle waiver. If a vehicle has failed an I/M test, a motorist may petition the director of the DPS for an individual vehicle waiver. Upon demonstration that the motorist has taken reasonable measures to comply with the requirements of the

vehicle emissions I/M program contained in the revised Texas I/M State Implementation Plan and that such waiver shall have minimal impact on air quality, the director may approve the petition, and the motorist may receive a waiver. Motorists may apply for the individual vehicle waiver each test cycle.

§114.53. Inspection and Maintenance Fees.

(a) The following fees must be paid for an emissions inspection of a vehicle at an inspection station. This fee shall include one free retest should the vehicle fail the emissions inspection, provided that the motorist has the retest performed at the same station where the vehicle originally failed and submits, prior to the retest, a properly completed Vehicle Repair Form showing that emissions-related repairs were performed and the retest is conducted within 15 days of the initial emissions test. For vehicles registered in Dallas, Tarrant, Harris, and El Paso Counties:

(1) Emissions Inspection Stations (Two Speed Idle / Annual Test): $13. The inspection station shall remit $1.75 to the Department of Public Safety (DPS).

(2) Emissions Inspection Stations (Loaded or Transient / Biennial Test): $26. The inspection station shall remit $1.75 to the DPS.

(3) The collection of inspection fees set forth in this subsection will coincide with the program start dates outlined in §114.50(a) of this title (relating to Applicability).

(b) The per-vehicle fee and the amount the inspection station remits to the DPS for a challenge test, at an inspection station designated by the DPS, shall be the same as the amounts set forth in subsection (a) of this section. The challenge fee shall not be charged if the vehicle is retested within 15 days of the initial test.

(c) Inspection stations performing out-of-cycle vehicle emissions inspections for the state's remote sensing element shall charge a motorist for an out-of-cycle emissions inspection in the amount specified in subsection (a) of this section, resulting from written notification that subject vehicle failed on-road testing, only, if such vehicle fails the emissions inspection and is registered outside the core program area. Inspection stations shall charge the DPS for all other vehicle emissions inspections resulting from on-road testing.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711014
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: November 5, 1997
For further information, please call: (512) 239–1970

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Subchapter D. Oxygen Requirements for Gasoline

30 TAC §114.100

The new rule is proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The proposed new rule is only a reformatting of existing rules and therefore do not implement any new state or federal requirements.

§114.100. Oxygenated Fuels.

(a) Beginning October 1, 1992, no person shall supply, sell, or dispense any gasoline for use as motor vehicle fuel in El Paso County during the period of October 1 through March 31 of each year, unless the gasoline has a minimum oxygen content of 2.7% by weight, except as allowed under subsection (g) of this section.

(b) No averaging, banking, or trading of oxygenate credits will be allowed until such time as a mechanism for the reporting and tracking of these credits is established by the Texas Natural Resource Conservation Commission (commission).

(c) All gasoline storage, refining, and blending facilities; gasoline terminal and bulk plants; and gasoline transporters affected by this section shall be registered with the commission and the El Paso City-County Health District. The owner or operator of each affected facility shall provide the following information to the commission and shall update this information, as necessary, by September 1 of each year:

(1) company name, mailing address, local street address, and telephone number;

(2) name and title of the company's chief executive officer and a local contact;

(3) type of facility;

(4) commission account numbers, if applicable; and

(5) description of the affected operation.

(d) All facilities affected by this section shall maintain complete and accurate records for at least two years and shall make such records available to representatives of the commission, EPA, or local air pollution agency having jurisdiction in the area upon request. The information in the records shall include, but shall not be limited to, the following:

(1) for refiners/importers of oxygenated gasoline,

(A) copies of all results of tests for oxygen content performed on batches of gasoline prior to transfer. For purposes of this rule, a batch of gasoline is considered any quantity greater than one gallon;

(B) copies of all bills of lading or transfer documents for each batch; and

(C) documents stating whether or not shipments of gasoline to any facility in a control area for use during a control period were oxygenated or non-oxygenated and stating oxygen content by weight of the gasoline, type of oxygenate used, and oxygenate content by volume.

(2) for blenders, gasoline terminals, and bulk plants,

(A) copies of all results of tests for oxygen content performed on batches of gasoline prior to transfer, or records of automated blending operations;

(B) copies of all documents stating the quantity and oxygen content of the gasoline received and the type of oxygenate received by the facility; and

(C) copies of all documents stating the quantity of gasoline shipped, whether gasoline shipments from the facility were oxygenated or non-oxygenated, and the type of oxygenate used.

(3) for gasoline transporters,

(A) copies of all documents stating the quantity of gasoline received by the transporter, whether the gasoline is oxygenated or non-oxygenated, and the type of oxygenate used; and

(B) copies of all bills of lading or transfer documents for each batch.

(4) for retailer and wholesale purchaser-consumer,

(A) copies of all documents stating the quantity of gasoline received by the facility, whether the gasoline is oxygenated or non-oxygenated, and the type of oxygenate used; and

(B) copies of all bills of lading or transfer documents for each batch.

(e) The oxygen content of gasoline at facilities affected by this section shall be determined by the following test methods:

(1) gasoline sampling methodology described in 40 CFR, Part 80, Appendix D;

(2) American Society for Testing and Materials Method D4815 for the control periods beginning in 1992 and thereafter;

(3) EPA Oxygenate Flame Ionization Detector Test Method; or

(4) other test methods approved by EPA beginning in 1995 and thereafter.

(f) Each gasoline pump at a retail outlet from which oxygenated gasoline is dispensed shall display a legible and conspicuous label on which either the statement in paragraph (1) or the statement in paragraph (2) of this subsection is printed in 36-point bold type in a color contrasting with the intended background. This label shall be placed so it is clearly legible from each side of the pump from which fuel can be dispensed.

(1) A label on which the following statement is printed shall be displayed only during the period of October 1 through March 31: "The gasoline dispensed from this pump is oxygenated and will reduce carbon monoxide pollution from motor vehicles."

(2) A label on which the following statement is printed shall be displayed during the period of October 1 through March 31 and may be displayed at any other time up to year-round: "From October 1 through March 31, the gasoline dispensed from this pump is oxygenated and will reduce carbon monoxide pollution from motor vehicles."

(g) The sale or distribution of non-oxygenated gasoline in a control area during the control period shall be allowed only under the following conditions:

(1) such gasoline is segregated from oxygenated gasoline;

(2) the documents which accompany such gasoline are clearly marked as "non-oxygenated gasoline, not for sale to ultimate consumers in a control area," and shall accompany the gasoline at all times;

(3) the product is clearly labeled as "blendstock," "export," "storage," or a similar statement to prohibit improper distribution; and

(4) the non-oxygenated gasoline is in fact not sold or dispensed to ultimate consumers during the control period in the control area.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711015
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: November 5, 1997
For further information, please call: (512) 239–1970

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Subchapter E. Low Emission Fleet Vehicle Requirements

30 TAC §§114.150–114.157

The new rules are proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The proposed new rules are only a reformatting of existing rules and therefore do not implement any new state or federal requirements.

§114.150. Requirements for Mass Transit Authorities.

(a) Mass transit authorities, as defined in §114.1 of this title (relating to Definitions), that own, operate, or control vehicles in the Beaumont/Port Arthur, Dallas/Fort Worth, El Paso, and Houston/Galveston nonattainment areas, as defined in §101.1 of this title (relating to Definitions), are subject to the low emission fleet vehicle provisions and requirements of this chapter.

(b) Mass transit authorities must ensure that at least 50% of their fleet vehicles are low emission fleet vehicles by September 1, 1996.

(c) Program Compliance Credits (PCCs) or Mobile Emission Reduction Credit (MERCs) under §§114.157, 114.201, or 114.202 of this title (relating to Program Compliance Credits; Mobile Emission Reduction Credit Program; and The Texas Mobile Emission Reduction Credit Fund) may be used to meet the percentage requirements of subsection (b) of this section.

(d) The acquisition of qualifying low emission fleet vehicles may qualify for both PCCs and MERCs, however only one type of credit may be used per vehicle.

(e) The percentage requirements of subsection (b) of this section may be met by the dual-fuel conversion or capability of conventional gasoline-powered or diesel-powered vehicles to be

certified as low emission fleet vehicles under the dual-fuel standards found in 40 Code of Federal Regulations, Part 88.

(f) Vehicles converted, purchased, leased, or otherwise acquired before September 1, 1998 may be counted towards a mass transit authority's compliance with the percentage requirements of subsection (b) of this section, in accordance with §114.152 of this title (relating to Use of Certain Vehicles for Compliance).

(g) Exceptions from the requirements of subsection (b) of this section may be granted under §114.153 of this title (concerning Exceptions).

(h) By September 30 of each year starting in 1996, mass transit authorities must submit annual reports as required under §114.155 of this title (relating to Reporting).

(i) Mass transit authorities must maintain records under §114.156 of this title (relating to Record Keeping).

(j) Mass transit authorities are eligible for MERCs under §114.201 or §114.202 of this title for the operation of light rail cars which have been demonstrated by the mass transit authority to have no direct emissions.

§114.151. Requirements for Local Governments and Private Persons.

(a) Local governments that own, operate, or control a fleet of more than 15 vehicles, excluding law enforcement and emergency vehicles, and private persons that own, operate, or control a fleet of more than 25 fleet vehicles, excluding emergency vehicles, are subject to the clean-fuel vehicle provisions and requirements of this chapter when operated primarily in the El Paso and Houston/ Galveston nonattainment areas.

(b) Beginning September 1, 1998, local governments and private persons, as specified by subsection (a) of this section, must ensure that their fleet vehicles are clean-fuel vehicles in accordance with the following schedule:

(1) 30% of fleet vehicles purchased after September 1, 1998; or at least 10% of the fleet vehicles in the total fleet as of September 1, 1998;

(2) 50% of fleet vehicles purchased after September 1, 2000; and at least 20% of the fleet vehicles in the total fleet as of September 1, 2000; and

(3) 90% of fleet vehicles purchased after September 1, 2002; and at least 45% of the fleet vehicles in the total fleet as of September 1, 2002.

(c) A local government or private person is not required to purchase clean-fuel vehicles if a proportion of 90% or more clean-fuel vehicles is maintained in their fleet.

(d) Program Compliance Credits (PCCs) or Mobile Emission Reduction Credit (MERCs) under §§114.157, 114.201, or 114.202 of this title (relating to Program Compliance Credits; Mobile Emission Reduction Credit Program; and The Texas Mobile Emission Reduction Credit Fund) may be used to meet the percentage requirements of subsection (b) of this section.

(e) The acquisition of qualifying clean-fuel vehicles may qualify for both PCCs and MERCs, however only one type of credit may be used per vehicle.

(f) The percentage requirements of subsection (b) of this section may be met by dual-fuel conversion or capability of conventional gasoline-powered or diesel-powered vehicles to be certified as clean-fuel vehicles under the dual fuel standards found in 40 Code of Federal Regulations, Part 88.

(g) Vehicles converted, purchased, leased, or otherwise acquired before September 1, 1998 may be counted towards a local government's or a private person's compliance with the percentage requirements of subsection (b) of this section in accordance with §114.152 of this title (relating to Use of Certain Vehicles for Compliance).

(h) Exceptions from the requirements of subsection (b) of this section may be granted under §114.153 of this title (relating to Exceptions).

(i) By September 1, 1997, or within 90 days of meeting the minimum fleet size where applicable, affected local governments and private persons specified under subsection (a) of this section must register with the executive director for identification and compliance tracking. Registration must include the submission of the following information:

(1) the affected entity's name, mailing address, telephone and fax numbers;

(2) the name, title, mailing address and telephone number of the specific person responsible for the affected fleet; and

(3) the total number of vehicles owned, operated, or controlled, including non-covered and exempted vehicles.

(j) Upon registration, the executive director will assign each fleet a unique identification number for data tracking purposes.

(k) By September 1 of each year, starting in 1998, affected local governments and private persons must submit reports to the executive director, as required under §114.155 of this title (relating to Reporting).

(l) Affected local governments and private persons must maintain records under §114.156 of this title (relating to Record Keeping).

(m) The requirements §114.1 of this title (relating to Definitions); §§114.150-114.157 of this title (relating to Requirements for Mass Transit Authorities; Requirements for Local Governments and Private Persons; Use of Certain Vehicles for Compliance; Exceptions; Exceptions for Certain Mass Transit Authorities; Reporting; Record Keeping; and Program Compliance Credits); and §114.201 and §114.202 of this title (relating to Mobile Emission Reduction Credit Program and the Texas Mobile Emission Reduction Credit Fund) do not apply to lessors of vehicles with regard to vehicles they lease or rent to other entities.

§114.152. Use of Certain Vehicles for Compliance.

Vehicles converted, purchased, leased, or otherwise acquired before September 1, 1998, may be counted toward compliance with the applicable fleet percentage requirements of §114.150 or §114.151 of this title (relating to Requirements for Mass Transit Authorities, and Requirements for Local Governments and Private Persons) if the vehicles:

(1) do not exceed 30% of an affected entity's fleet on September 1, 1998;

(2) are capable of operating on one of the following fuels;

(A) electricity;

(B) ethanol, or ethanol/gasoline blends of 85% or greater ethanol;

(C) liquefied petroleum gas, commonly referred to as propane;

(D) methanol or methanol/gasoline blends of 85% or greater methanol; or

(E) natural gas; and

(3) meet at a minimum the following emission standards:

(A) for light-duty vehicles, the federal Tier I emission standards under the FCAA as amended, Section 202, U.S.C. 42 Section 7521, and 40 Code of Federal Regulations, Part 86; or

(B) for heavy-duty vehicles, the federal emission standards in place at the time of their manufacture.

§114.153. Exceptions.

(a) Exceptions from the applicable clean-fuel vehicle requirements of this chapter may be granted for a period of up to two years. Exceptions are based on the determination by the executive director that one of the following conditions exist:

(1) A firm engaged in fixed price contracts with public works agencies can demonstrate that compliance with the requirements of clean-fuel vehicle provisions and requirements of this chapter would result in substantial economic harm to the firm under a contract entered into before September 1, 1997. The following documentation must be submitted to the executive director when applying for this exception:

(A) copies of the relevant contracts; and

(B) a demonstration of how and by what means the firm would be harmed by complying with the requirements of the clean-fuel vehicle provisions and requirements of this chapter.

(2) The affected entity's vehicles will be operating primarily in an area that does not have or cannot reasonably be expected to establish adequate refueling for the operation of clean-fuel vehicles as required by the clean-fuel vehicle provisions and requirements of this chapter. The following information must be submitted to the executive director when applying for this exception:

(A) the name of the county where the affected entity's fleet primarily operates;

(B) the physical address of the nearest refueling station that provides fuels necessary for clean-fuel operation; and

(C) a demonstration of the normal operating range of the affected entity's fleet sufficient for the executive director to determine that the fleet will be operating primarily in an area that does not have or cannot be reasonably expected to establish adequate refueling for the fleet's normal operational needs.

(3) The affected entity is unable to secure financing provided by or arranged through the proposed supplier or suppliers of the fuel necessary for the operation of the clean-fuel vehicles required by the clean-fuel vehicle provisions and requirements of this chapter sufficient to cover the additional costs of such fueling. The following information must be submitted to the executive director when applying for this exception:

(A) a description of the financing required by the affected entity;

(B) a description of the financing offered by the proposed supplier(s) of the fuels necessary for the operation of clean-fuel vehicles; and

(C) a demonstration of why the affected entity is unable to secure such financing as provided by the fuel supplier sufficient to cover the additional costs of fueling clean-fuel vehicles.

(4) The projected net costs of the fueling, conversion or replacement, and operation of clean-fuel vehicles reasonably is expected to exceed comparable costs of the fueling, replacement, and operation of conventional vehicles when measured over the expected useful life of such vehicles and after including in such cost calculations any available state or federal funding or incentives for the use of fuels required to operate clean-fuel vehicles. The following information must be submitted to the executive director when applying for this exception:

(A) types of vehicles needed; and

(B) a demonstration of how the projected net costs of using clean-fuel vehicles exceeds the comparable costs of using conventional vehicles over the useful life of such vehicles, after the identification of any available state or federal funding or incentives for the use of fuels required to fuel clean-fuel vehicles.

(b) Exception applications will be reviewed by the executive director in accordance with the following process and are subject to the following provisions:

(1) Exception applications will be reviewed on a case by case basis;

(2) All currently available vehicle/fuel configurations must be evaluated by the affected entity before an exception application will be reviewed;

(3) The executive director may request additional information in order to evaluate an exception application;

(4) Applications will be accepted by the executive director at any point within the 12 months preceding a compliance deadline, provided a current fleet report containing the information in §114.155 of this title (relating to Reporting) is also provided;

(5) The affected entity receiving a notice of exception must maintain a copy of the notice on-site at the reported fleet address for the duration of the exception period and must make such copies available to the executive director or local air pollution control agencies upon request;

(6) Affected entities who are operating under an exception may not trade or sell Program Compliance Credits or Mobile Emission Reduction Credits, or enter into a contract according to §§114.157, 114.201, or 114.202 of this title (relating to Program Compliance Credits; Mobile Emission Reduction Credit Program; and the Texas Mobile Emission Reduction Credit Fund), for the duration of the exception period; and

(7) Affected entities will not be considered in violation of the applicable clean-fuel vehicle requirements of this chapter while an exception application is under review by the executive director, if

the exception application has been submitted to the executive director before the applicable compliance date.

§114.154. Exceptions for Certain Mass Transit Authorities.

(a) This section applies only to a mass transit authority confirmed at a tax election before July 1, 1985, and in which the principal city has a population of less than 750,000, according to the most recent federal census.

(b) The executive director may reduce any percentage specified by, or waive the requirements of, Texas Transportation Code, §451.301 for up to two years, for an authority on receipt of certification supported by evidence acceptable to the executive director that:

(1) the authority's vehicles will be operating primarily in an area in which neither the authority nor a supplier has or can reasonably be expected to establish a central refueling station necessary for the operation of clean-fuel vehicles; or

(2) the authority is unable to acquire or be provided equipment or refueling facilities necessary to operate clean-fuel vehicles at a projected cost that is reasonably expected to result in no greater net costs than the continued use of equipment or refueling facilities used to operate conventional vehicles, measured over the expected useful life of the equipment or facilities supplied.

(c) Certification by the executive director that an authority covered by Texas Transportation Code, §451.301, is unable to comply is accomplished through development of a proposal to be submitted to the executive director. The proposal must:

(1) contain an alternative implementation schedule for meeting the percentage requirements of Texas Transportation Code, §451.301; and

(2) have been the subject of a public meeting held to discuss the authority's inability to comply with Texas Transportation Code, § 451.301, and the alternative implementation schedule.

§114.155. Reporting.

(a) Affected entities must submit annual fleet reports to the executive director. The report must contain, at a minimum:

(1) the fleet identification number (when assigned);

(2) the total number of vehicles registered according to the Texas Transportation Code, §502.002;

(3) the total number of fleet vehicles registered according to the Texas Transportation Code, §502.002;

(4) vehicle license numbers, model years, manufacturers, model types, vehicle identification numbers, gross vehicle weight rating, fuel type(s) and certified emission standards of each vehicle being used for compliance with the requirements of §114.150 or §114.151 of this title (relating to Requirements for Mass Transit Authorities and Requirements for Local Governments and Private Persons);

(5) an estimate of the annual vehicle miles traveled (VMT) for each clean-fuel vehicle;

(6) if the vehicle is a dual-fuel vehicle, documentation demonstrating the percentages of the vehicle's operation on each fuel, as documented by the VMT operated on each fuel; and

(7) a demonstration of compliance with the applicable implementation schedule.

(b) Affected entities may submit the information required in section (a) of this section for all vehicles in their fleet.

§114.156. Record Keeping.

Affected entities must maintain copies of the reports required by §114.155 of this title (relating to Reporting) on-site at the reported fleet address for a minimum of three years and shall make such reports available to the executive director or local air pollution control agencies having jurisdiction in the area upon request.

§114.157. Program Compliance Credits.

(a) Program Compliance Credits (PCCs) may be awarded only to affected entities for any of the following, or any combination thereof:

(1) The acquisition of a clean-fuel vehicle which is certified to a more stringent emission standard than the low emission vehicle (LEV) standards, which include;

(A) ultra low emission vehicle (ULEV) certified clean-fuel vehicles;

(B) inherently low emission vehicle (ILEV) certified clean-fuel vehicles; or

(C) zero emission vehicle (ZEV) certified clean-fuel vehicles.

(2) The acquisition of clean-fuel vehicles in greater numbers than otherwise required under §114.150 or §114.151 of this title (relating to Requirements for Mass Transit Authorities and Requirements for Local Governments and Private Persons);

(3) The acquisition of clean-fuel vehicles in a category not otherwise required under §114.150 or §114.151 of this title; or

(4) The acquisition of a clean-fuel vehicle before the dates required under §114.150 or 114.151 of this title.

(b) PCCs will be awarded in two-year increments from 1998 until 2002. After 2002, credits will be awarded according to the estimated remaining useful life of the vehicle.

(c) PCCs may be used to demonstrate compliance with clean-fuel vehicle provisions and requirements of this chapter, or may be banked for later use, or they may be traded, sold, or purchased, for use by any other person in the same nonattainment area, to demonstrate compliance with the clean-fuel vehicle provisions and requirements of this chapter.

(d) PCCs have the following values:

(1) LEV - one credit;

(2) ULEV - two credits; and

(3) ILEV and ZEV - three credits.

(e) Affected entities proposing to generate PCCs under this chapter may apply at any time to the executive director. A current fleet report containing the information in §114.155 of this title (relating to Reporting) must accompany the application. Affected entities may also indicate their desire to obtain PCCs concurrent with fleet registration or annual reporting. The submission of additional vehicle or fleet information may be required.

(f) PCCs will be banked with the Mobile Source Division.

(g) Upon verification by the executive director:

(1) each fleet will be issued a certificate where applicable; and

(2) a total credit summary sheet will be issued to the fleet.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711016
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: November 5, 1997
For further information, please call: (512) 239–1970

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Subchapter F. Vehicle Retirement and Mobile Emission Reduction Credits

Vehicle Retirement

30 TAC §114.200

The new rule is proposed under the Texas Health and Safety Code, the Texas Clean Air Act (Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The proposed new rule is only a reformatting of existing rules and therefore do not implement any new state or federal requirements.

§114.200. Accelerated Vehicle Retirement Program.

(a) The purpose of this program is to reduce mobile source emissions of volatile organic compounds (VOCs) and oxides of nitrogen (NO_x), and provide additional flexibility for stationary sources in the following ozone nonattainment counties: Brazoria, Chambers, Collin, Dallas, Denton, El Paso, Fort Bend, Galveston, Harris, Liberty, Montgomery, Tarrant, and Waller. A scrappage program reduces VOC, NO_x, and carbon monoxide emissions from mobile sources, such as automobiles and light duty trucks, by permanently removing high-emitting vehicles from the area wide fleet. With this rule, stationary sources will have the opportunity to select the most cost-effective approach to comply with federal and state regulations for ozone reductions. The Accelerated Vehicle Retirement program is a voluntary program for both the stationary source and the motorist.

(b) In order for a mobile source emission reduction to be creditable under these rules and certified in accordance with §101.29 of this title (relating to Emissions Banking and Trading), the following procedures and requirements must be met.

(1) Entities seeking to obtain mobile emission reduction credits (MERCs) through automobile scrappage shall submit a scrappage plan to the executive director at least 45 days prior to planned initiation of vehicle scrapping. The executive director reserves the right to reject a scrappage plan if it does not meet the requirements outlined in this regulation. The sponsor will be notified within 30 days of receipt of the plan by the commission if it is rejected, otherwise the plan is acceptable. The plan should include, to the extent applicable, the following items:

(A) the purpose of the scrappage program;

(B) the planned number of cars to be scrapped;

(C) the proposed purchase price for the vehicles;

(D) the targeted number of tons per year of MERCs to be generated by the scrappage program;

(E) the manner in which the sponsor will locate potential scrappage vehicles;

(F) the location and dates for the vehicle screening and documentation review, if there is a prescreening prior to the purchase of the vehicle;

(G) the name and address of the dealer;

(H) the name and location of the scrapper recycling and reclaiming the scrappage vehicles;

(I) the date the scrappage sponsor will initiate the program and the proposed end date; and

(J) the scrappage sponsor contact person, address, and phone number.

(2) To be eligible for the scrappage program, a vehicle must have been registered to an address within an ozone nonattainment area for at least 12 months prior to the sale of the vehicle. Proof of insurance for the same 12-month period is required at the point of sale. The vehicle is eligible for scrappage only in the nonattainment area in which it is registered.

(3) The owner of the scrappage vehicle or legal representative of the owner must be present at the time of the sale. The certificate of title must contain the current owner's name. The vehicle title is surrendered to the dealer at the time of the sale. The scrapper shall take possession of the certificate of title when the vehicle is transferred to the scrapper from the dealer. The vehicle owner must have lived in the same nonattainment area in which the vehicle is registered for the 12 months prior to the sale of the vehicle and present proof to this effect. The owner must present at the time of sale a picture identification to verify vehicle ownership and a voter registration card, driver's license, utility bill, property tax bill/payment, or a school tuition receipt to verify residency in the nonattainment area. Other documentation may be requested to verify the identity and address of the owner.

(4) The scrappage vehicle must be in operable condition and driven to the scrapper's location. Vehicles cannot be towed or trailered to the scrapper's site.

(5) The owner of the scrappage vehicle must have obtained an IM240 vehicle emission certificate (VEC), at a referee facility, prior to the sale of the vehicle. A purge and pressure test will be required as specified by the Texas Inspection and Maintenance (I/M) program. The vehicle is eligible for scrappage for up to 90 calendar days following the IM240 emission test. A motorist must submit the vehicle to an emissions test according to the following procedures.

(A) If the vehicle is on testing cycle, the owner shall first go to an emission testing center for the required emission test. If the vehicle fails the test, the owner should obtain a repair estimate

from a certified emission repair technician of Texas operating at a certified facility, as specified in §114.50 of this title (relating to Vehicle Emissions Inspection Requirements). If the owner chooses to scrap the vehicle rather than register or repair it, she/he shall take the vehicle to a referee facility for an IM240 emission test, unless an IM240 test was conducted at the emission testing center. Appointments for emission tests will be required at all referee facilities and a fee will be charged, as specified by the Texas I/M program. The owner shall obtain a vehicle emission certificate at the referee facility or the emission testing center for newer model vehicles, which must be presented to the scrappage dealer, along with the repair estimate, at the time the vehicle is sold.

(B) If the vehicle is off-cycle or the vehicle owner has received a minimum expenditure waiver or hardship waiver within the last 18 months, the owner should go directly to the referee facility for an IM240 emission test. Appointments for emission tests will be required at all referee facilities and a fee will be charged, as specified by the Texas I/M program. The owner shall obtain a vehicle emission certificate at the referee facility, which must be presented to the scrappage dealer at the time the vehicle is sold.

(C) Scrappage sponsors may solicit vehicle owners for potential scrappage vehicles at any time during the year. Vehicles solicited by the sponsor will be required to follow the same procedures specified in subparagraphs (A) and (B) of this paragraph.

(6) The scrappage sponsor, dealer, or scrapper is responsible for setting the price for each scrappage vehicle. The sponsor or dealer may not set vehicle purchase prices based on the emission level of any individual vehicle.

(7) All scrappage vehicles shall be scrapped by a scrapper certified by the Commission.

(c) Following the scrappage event or as MERCs are needed in a continuous program, the scrappage sponsor shall submit the following documents for each scrapped vehicle to the commission Emissions Bank to obtain certified MERCs. The executive director reserves the right to eliminate any vehicle from the MERC calculation that does not comply with the requirements outlined in subsection (b) of this section or for which proper documentation, as described in paragraphs (1)-(5) of this subsection, is not provided:

(1) the vehicle emission certificate;

(2) where applicable, a repair estimate signed by a certified repair technician;

(3) a copy of the vehicle title;

(4) a copy of the owner's driver's license, plus copies of any other identification documentation provided to the dealer; and

(5) all information listed in subsection (h)(1)(A)-(H) of this section.

(d) In order for a scrapper to obtain and maintain certification under the Accelerated Vehicle Retirement program, the facility must comply with the following requirements.

(1) The facility must be a licensed motor vehicle salvage dealer as required by the Texas Department of Transportation.

(2) The facility must have a customer parking area for at least 30 vehicles.

(3) The facility must be able to process the paperwork for 25 scrappage vehicles and move them out of the parking area within 24 hours of their arrival.

(4) The facility must be open at least one night a week until 7:00 p.m. and from 9:00 a.m. until 1:00 p.m. on Saturday during a scrappage event.

(5) The facility must handle all automotive material in a manner that protects the environment and is in accordance with all local, state, and federal regulations for waste management and clean water. At a minimum, the facility must comply with the following procedures:

(A) process all scrappage vehicles in the following manner:

(i) drain the crankcase of all motor oil and properly recycle the oil with a registered used oil handler. If the oil filter is removed, it should also be properly recycled;

(ii) evacuate the air conditioning system of all refrigerant and properly recycle with a certified reclaimer as specified in the Code of Federal Regulations, Title 40, Part 82;

(iii) drain the antifreeze or coolant and properly recycle;

(iv) drain the transmission fluid, brake fluid, and power steering fluid to the extent possible and properly recycle;

(v) drain all fuel and reuse or properly recycle; and

(vi) remove the battery and store on raised shelves in a covered shelter. The shelter must have a cement floor. Good batteries may be recycled. Bad batteries shall be disposed of in accordance with §330.1103 of this title (relating to Disposal of Batteries);

(B) drain and capture all the automotive fluids, as described in subparagraph (A)(i)-(v) of this paragraph, within four business days of the vehicle's arrival at the facility's location;

(C) prevent leaks and spills of any automotive fluid, and immediately remediate spills at all scrapper locations;

(D) where available, recycle automotive fluids with a registered recycler;

(E) provide a complete listing of all the companies that the certified scrapper uses to manage the automotive fluids and batteries. The facility shall provide any revisions to this list within 14 days of the change; and

(F) maintain manifests for all the fluids transported from the scrapper's location. These manifests shall be made available to commission staff upon request.

(6) A certified scrapper is allowed to recycle or sell all parts of the vehicle with the following exceptions:

(A) the exhaust system, including the catalytic converter, tailpipe, muffler, exhaust inlet pipe, vapor storage canister, vapor liquid separator, and resonator. These items must be destroyed. The catalytic converter can be recycled for the precious metals, but cannot be reused; and

(B) the engine with all the components attached. The cylinder block and other engine components can be recycled only if the component parts are removed and recycled individually.

(7) A scrapper must renew its certification every five years. A scrapper's certification may be suspended or revoked for good cause at any time by order of the commission after notice and opportunity for public hearing is provided under the Texas Government Code, §2001.054. Good cause includes, but is not limited to, failure to comply with the certification, operating conditions, and requirements contained in this subsection. The commission may refuse to issue a certification under this subsection if the applicant has a history of noncompliance with the provisions of this subsection or for other good cause shown.

(e) Each scrappage vehicle creates a measurable emission reduction of VOCs, NO_x, and carbon monoxide (CO).

(1) The emission reduction is calculated using the following equation for VOC, NO_x, or CO:
Figure 1: 30 TAC §114.200(e)(1)

(2) The emission reduction generated by each scrappage vehicle is converted into a MERC that can then be deposited in the commission Emissions Bank or transferred directly to the scrappage sponsor. The commission Emissions Bank calculates the MERC value for the pool of vehicles or each individual vehicle in tons per year as the dealer submits the supporting documentation (application) to the commission Emissions Bank. The application for MERCs must occur within 10 months of the date each vehicle is purchased by the dealer. The commission Emissions Bank has two months to certify the credits requested in the application. The MERCs expire 36 months following its certification by the commission Emissions Bank.

(3) The emission reduction, as calculated in paragraph (1) of this subsection for VOC, NO_x, or CO, is multiplied by a factor that converts grams per year into tons per year. The MERC calculation for stationary source usage for year one is as follows:
Figure 2: 30 TAC §114.200(e)(3)

(4) The following restrictions apply to the MERC calculation:

(A) for a failed vehicle with a repair estimate less than the minimum expenditure as set forth in the Vehicle Emission Inspection and Maintenance (I/M) program, TE equals the IM240 emission standard by model year, as reported in the EPA High-Tech I/M Test Procedures, Emission Standards, Quality Control Requirements, and Equipment Specifications, Final Technical Guidance, §85.2205;

(B) for a failed vehicle with a repair estimate greater than or equal to the minimum expenditure as set forth in the Vehicle Emission (I/M) program, TE equals the IM240 emission measurement;

(C) for a vehicle that has received a one-time hardship waiver or a minimum expenditure waiver within the last 18 months, TE equals the IM240 emission measurement;

(D) for a failed vehicle with no repair estimate, TE equals the IM240 emission standard by model year, as reported in the EPA High-Tech I/M Test Procedures, Emission Standards, Quality Control Requirements, and Equipment Specifications, Final Technical Guidance, §85.2205;

(E) for a vehicle that is tested off cycle or is not required to be emission tested, TE equals the IM240 emission measurement;

(F) for a vehicle that passes, TE equals the IM240 emission measurement; and

(G) for a vehicle that fails due to tampering, TE equals the emission standard by model year, as reported in the EPA High-Tech I/M Test Procedures, Emission Standards, Quality Control Requirements, and Equipment Specifications, Final Technical Guidance, §85.2205.

(5) The MERC value for year two is 20% lower than the MERC value for year one. The MERC value for year three is 20% lower than the MERC value for year two. The discounting in year two and year three adjusts the MERC value for the natural attrition in the vehicle fleet that occurs over time. The MERC purchaser has the option of averaging the discounts over the 36-month life of the credit, in 12-month increments, or applying the discount in year two and year three, thereby reducing the MERC value in each succeeding year. The MERCs cannot be distributed across the 36-month life of the credit in any manner that may cause excessive emissions in year one, two, or three.

(f) The MERCs can be used to achieve compliance as provided for in any provision of Chapter 115 of this title (relating to Control of Air Pollution from Volatile Organic Compounds) and §117.540 of this title (relating to Phased Reasonably Available Control Technology) and as offsets as set forth in §101.29 of this title. The MERCs shall be banked in accordance with §101.29 of this title.

(g) The commission scrappage program will begin on January 1, 1995 in the three ozone nonattainment areas in Texas: Houston/Galveston, Dallas/Fort Worth, and El Paso.

(h) The MERCs may be generated in the ozone nonattainment counties of Hardin, Jefferson, and Orange in accordance with the EPA Interim Guidelines on the Generation of Mobile Source Emission Reduction Credits, EPA Guidance for Implementation of Accelerated Retirement of Vehicle programs, February 1993, and subsections (b)(2)-(4), (b)(6)-(7), (c)(3)-(5), (d), (e)(2), (e)(5), and (f) of this section. A scrappage plan, as described in subsection (b)(1), must be submitted to the executive director for approval 120 days prior to the initiation of vehicle scrapping.

(i) The commission Emissions Bank will maintain a data base containing the following information:

(1) for each scrappage vehicle purchased:

(A) the model year, model, make, transmission type, engine size, and vehicle identification number;

(B) the scrappage vehicle owner's name, address, telephone number, and driver's license number;

(C) the final odometer reading, the date on the old safety inspection sticker, and the mileage on the old safety inspection sticker. If the odometer is not functioning properly, refer to subsection (e)(1) of this section for the methodology to calculate VMT;

(D) the date purchased by the dealer;

(E) the purchase price;

(F) the IM240 emission test results and purge/pressure test results;

(G) the dealer/scrapper that processed the vehicle;

(H) in the case of a scrappage event, the scrappage sponsor that purchased the vehicle;

(I) the repair estimate from the certified repair technician; and

(J) the MERC value for that vehicle;

(2) for each MERC sold:

(A) the purchase price;

(B) the name and location of the seller;

(C) the name, location, and the commission account of the buyer;

(D) tons per year for year one, two, and three; and

(E) creation, certification, and expiration dates.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711018
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: November 5, 1997
For further information, please call: (512) 239–1970

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Mobile Emissions Credits

30 TAC §114.201, §114.202

The new rules are proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The proposed new rules are only a reformatting of existing rules and therefore do not implement any new state or federal requirements.

§114.201. Mobile Emission Reduction Credit Program.

(a) Mobile Emission Reduction Credits (MERCs) will be based on the difference between the emissions from the clean-fuel vehicle and the conventional vehicle, and will be awarded to affected entities and to individuals located within the state's nonattainment areas for any of the following, or combination thereof:

(1) The acquisition of a clean-fuel vehicle which is certified to a more stringent emission standard than the low emission vehicle (LEV) standards, which include:

(A) ultra-low emission vehicle certified clean-fuel vehicles,

(B) inherently low emission vehicle certified clean-fuel vehicles, and

(C) zero emission vehicle certified clean-fuel vehicles; or

(2) The acquisition of clean-fuel vehicles in greater numbers than otherwise required under §114.150 or §114.151 of this title (relating to Requirements for Mass Transit Authorities, and Requirements for Local Governments and Private Persons);

(3) The acquisition of clean-fuel vehicles in a category not required under §114.150 or §114.151 of this title; or

(4) The acquisition of clean-fuel vehicles before the dates under §114.150 or §114.151 of this title.

(b) MERCs may be:

(1) used to demonstrate compliance with the clean-fuel vehicle provisions and requirements of this chapter or any other mobile source program that has marketable credits;

(2) banked for later use; or

(3) traded, sold, or purchased for use by any other person in the same nonattainment area to demonstrate compliance with the clean-fuel vehicle provisions and requirements of this chapter.

(c) The following restrictions apply to the trading or purchasing of fleet to fleet MERCs:

(1) Trades are restricted to the nonattainment area in which they are generated;

(2) Light-duty vehicle MERCs are restricted to trading within the light-duty class; and

(3) Heavy-duty vehicle MERCs may be traded within their specific subclass or from a heavier vehicle to a lighter vehicle (downward trading) within the heavy-duty class.

(d) For fleet to fleet trading or demonstration of compliance, MERCs will be quantified in terms of fleet to fleet credits using the following equation:
Figure 1: 30 TAC §114.201(d)

(e) For trades to stationary sources, the following methodology is used for the calculation of MERCs for volatile organic compounds (VOCs) or oxides of nitrogen (NO_x) trades:
Figure 2: 30 TAC §114.201(e)

(f) In order for credits to be certified as tradable for stationary sources, fleets must have a minimum of 1 ton per year reduction of VOCs or NO_x. Affected entities may aggregate VOCs or NO_x MERCs generated under this section in order to make the minimum one ton of emission reductions for trades to stationary sources.

(g) In order to apply for a MERC, an affected entity or individual must submit the following information to the executive director:

(1) the certified emission standard of the vehicle for which the affected entity or individual wishes to make an application for credit;

(2) the annual VMT traveled by the vehicle;

(3) the amount of time in years this vehicle is expected to be in service; and

(4) a current fleet report containing the information in §114.155 of this title (relating to Reporting). The submission of additional vehicle or fleet information may be required at this time.

(h) MERCs for trading between fleets will be banked with the Mobile Source Division.

(i) MERCs for trading between fleets and stationary sources will be banked with the commission Emissions Bank.

(j) Upon certification by the executive director, each vehicle will be issued a certificate indicating, where applicable:

(1) the standard to which the vehicle is certified;

(2) the weight class of the vehicle;

(3) the amount of emissions reduced per year in tons;

(4) the number of years the emission reductions will be credited; and

(5) the number of light-duty or heavy-duty vehicle fleet to fleet MERCs.

(k) A total emissions credit summary sheet will be issued to the fleet upon issuance of any MERC certificate.

(l) MERCs will be awarded in two-year increments for the period of 1998 through 2002. After 2002, MERCs will be awarded according to the expected remaining useful life of the vehicle.

(m) The following are considered violations of the Texas Mobile Emission Reduction Credit Program:

(1) claiming a MERC without meeting the appropriate acquisition requirements;

(2) submission of false date as information requested by commission rules; or

(3) counterfeiting or dealing commercially in counterfeit MERC certificates.

(n) Any person found to be in violation of the Texas Mobile Emission Reduction Credit Program is subject to a civil penalty of not more than $25,000 per violation.

§114.202. The Texas Mobile Emission Reduction Credit Fund.

(a) Mobile emission reduction credits may be assigned through the Texas Mobile Emission Reduction Credit Trading Fund as established by this section to affected entities provided:

(1) the affected entity enters into a binding contract with the commission, agreeing to purchase and place in service in designated program areas clean-fuel vehicles in accordance with the number of credits issued and the time frame specified by the commission; and

(2) the affected entity agrees to name the EPA as a third-party beneficiary of its contract with the commission.

(b) Contracts entered into under this section may be enforced in the courts of the State of Texas by an order of specific performance.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711019

Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: November 5, 1997
For further information, please call: (512) 239–1970

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Subchapter G. Transportation Planning

30 TAC §§114.250, 114.260, 114.270

The new rules are proposed under the Texas Health and Safety Code, the Texas Clean Air Act (TCAA), §382.017, which provides the commission with the authority to adopt rules consistent with the policy and purposes of the TCAA.

The proposed new rules are only a reformatting of existing rules and therefore do not implement any new state or federal requirements.

§114.250. Memorandum of Understanding with the Texas Department of Transportation.

(a) The Texas Natural Resource Conservation Commission (commission) adopts as Exhibit A a Memorandum of Understanding (MOU) between the commission and the Texas Department of Transportation (TxDOT) concerning:

(1) the review of TxDOT projects which may affect air quality, in order to assist TxDOT in making environmentally sound decisions; and

(2) the development of a system by which information developed by TxDOT and the commission may be exchanged to the mutual benefit of both agencies.

(b) The MOU follows as Exhibit A.

(c) Copies of the MOU are available at the Texas Natural Resource Conservation Commission, Mobile Source Division, P.O. Box 13087, Austin, Texas 78711-3087.

§114.260. Transportation Conformity.

(a) Purpose. The purpose of this section is to implement the requirements set forth in Title 40 of the Code of Federal Regulations (40 CFR) Part 51, Subpart T (relating to Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded, or Approved Under Title 23 United States Code or the Federal Transit Act), which are the regulations developed by the EPA under the FCAA Amendments of 1990, §176(c). It includes policy, criteria, and procedures for demonstrating and assuring conformity of transportation planning activities with the State Implementation Plan (SIP).

(b) Applicability. This section applies to transportation-related pollutants for which an area is designated nonattainment or is subject to a maintenance plan. The pollutants include ozone, carbon monoxide, nitrogen dioxide, particles with an aerodynamic diameter of less than or equal to ten micrometers (PM_{10}), and the precursors of those pollutants. The affected nonattainment and maintenance areas are listed in §101.1 of title (relating to Definitions).

(c) CFR incorporation. The provisions promulgated in the following listed sections of 40 CFR, Part 51, Subpart T, dated November 24, 1993, are hereby incorporated by reference: §§51.392, 51.394, 51.398, 51.400, 51.404, 51.406, 51.408, 51.410, 51.412,

51.414, 51.416, 51.418, 51.420, 51.422, 51.424, 51.426, 51.428, 51.430, 51.432, 51.434, 51.436, 51.438, 51.440, 51.442, 51.444, 51.446, 51.448, 51.450, 51.452, 51.454, 51.456, 51.458, 51.460, 51.462, and 51.464.

(d) Consultation. Under 40 CFR, §51.402 regarding consultation, the following procedures shall be undertaken in nonattainment and maintenance areas before making conformity determinations and before adopting applicable SIP revisions.

(1) General factors.

(A) For the purposes of this subsection, concerning consultation, the affected agencies shall include:

(i) EPA;

(ii) Federal Highway Administration (FHWA);

(iii) Federal Transit Administration (FTA);

(iv) Texas Department of Transportation (TxDOT);

(v) metropolitan planning organizations (MPOs) in nonattainment or maintenance areas;

(vi) local publicly-owned transit services in nonattainment or maintenance areas (the designated recipient of FTA §9 funds);

(vii) Texas Natural Resource Conservation Commission (commission);

(viii) local air quality agencies in nonattainment or maintenance areas (recipients of FCAA, §105 funds);

(B) All correspondence with the affected agencies in subparagraph (A) of this paragraph shall be addressed to the following designated point of contact:

(i) MPO: executive director or designee;

(ii) commission: executive director or designee;

(iii) TxDOT: Director of Transportation Planning and Programming or designee;

(iv) TxDOT: Director of Environmental Affairs Division or designee;

(v) FHWA: Administrator of Texas Division or designee;

(vi) FTA: Director of Office of Program Development - FTA Region 6, or designee;

(vii) EPA: Regional Administrator - EPA Region 6, or designee;

(viii) TxDOT District: District Engineer or designee;

(ix) local publicly-owned transit services (the designated recipient of FTA §9 funds): General Manager or designee;

(x) local air quality agencies (recipients of FCAA, §105 funds): Director or designee; and

(xi) commission regions in nonattainment or maintenance areas: regional director or designee.

(2) Roles and responsibilities of affected agencies.

(A) The MPO, in cooperation with TxDOT and publicly owned transit services, shall consult with the agencies in paragraph (1)(A) of this subsection in the development of Metropolitan Transportation Plans (MTPs), Transportation Improvement Programs (TIPs), projects, technical analyses, travel demand or other modeling, and data collection. Specifically, the MPOs shall:

(i) allow the commission's Mobile Source Division Director, or a designated representative, to participate in meetings of technical committees on surface transportation and air quality in each nonattainment and maintenance area in order to consult directly with the particular committee during the development of the transportation plans, programs, and projects;

(ii) send information on time and location, an agenda, and supporting materials (including preliminary versions of MTPs and TIPs) for all regularly scheduled meetings on surface transportation or air quality to each of the agencies specified in paragraph (1)(B) of this subsection. Such information shall be provided in accordance with the locally adopted public involvement process as required by 23 CFR, Part 450, §450.316(b)(1);

(iii) after preparation of final draft versions of MTPs and TIPs, and before adoption and approval by the affected governing body, ensure that the agencies specified in paragraph (1)(B) of this subsection receive a copy, and that they are included in the local area's public participation process as required by the Metropolitan Planning Rule, 23 CFR, §450.316(b)(1). Upon approval of MTPs and TIPs, MPOs shall distribute final approved copies of the documents to the agencies specified in paragraph (1)(B) of this subsection;

(iv) for the purposes of regional emissions analysis, initiate a consultation process with the affected agencies specified in paragraph (1)(A) of this subsection during the development stage of new or revised MTPs and TIPs to determine which transportation projects should be considered regionally significant and which projects should be considered to have a significant change in design concept and scope from the effective MTP and TIP. Regionally significant projects will include, at a minimum, all facilities classified as principal arterial or higher, or fixed guide way systems or extensions that offer an alternative to regional highway travel. Also, these include minor arterials included in the travel demand modeling process which serve significant interregional and intraregional travel, and connect rural population centers not already served by a principal arterial, or connect with intermodal transportation terminals not already served by a principal arterial. A significant change in design concept and scope is defined as a revision of a project in the MTP or TIP that would significantly affect model speeds, vehicle miles traveled, or network connections. In addition to new facilities, examples may include changes in the number of through lanes or length of project (more than one mile), access control, addition of major intermodal terminal facilities (such as new international bridges, park-and-ride lots, and transfer terminals), addition/deletion of interchanges, or changing between free and toll facilities. When a significant change in the design and scope of a project is proposed, the MPO shall document the rationale for the change and give the affected agencies specified in paragraph (1)(A) of this subsection a 30-day opportunity to comment on their rationale. The MPO shall consider the views of each agency that comments, and respond in writing prior to any final action on these issues. If the MPO receives no comments within 30 days, the MPO may assume concurrence by the agencies specified in paragraph (1)(A) of this subsection;

(v) include in the TIP a list of projects exempted from the requirements of a conformity determination under 40 CFR, Part 51, §51.460 and §51.462. The MPO shall consult with the affected agencies specified in paragraph (1)(A) of this subsection in determining if a project on the list has potentially adverse emissions for any reason, including whether or not the exempt project will interfere with implementation of an adopted transportation control measure (TCM). The MPO shall respond in writing to all comments within 30 days on final MTP and TIP documents. If no comments are received as part of the public involvement process for the TIP, the MPO may proceed with implementation of the exempt project;

(vi) notify the affected agencies specified in paragraph (1)(A) of this subsection in writing of any MTP or TIP revisions or amendments which add or delete the exempt projects identified in 40 CFR, §51.460;

(vii) as required by 40 CFR, §51.424 and §51.454 of the final EPA transportation conformity rule, make a preliminary identification of those projects located at sites in PM_{10} nonattainment and maintenance areas that require quantitative PM_{10} Hot Spot analyses. After these projects have been identified, the MPO shall submit a list of these projects and sufficient data to the agencies specified in paragraph (1)(A) of this subsection for review and comment;

(viii) before adoption of any new or substantially different methods or assumptions used in the Hot Spot or Regional Emissions Analysis, provide an opportunity for the agencies specified in paragraph (1)(A) of this subsection to review and comment;

(ix) in coordination with TxDOT and the local transit agencies, disclose all known, regionally significant, non-federal projects, even if the sponsor has not made a final decision on its implementation; include all disclosed, or otherwise known, regionally significant non-federal projects in the regional emissions analysis for the nonattainment area; respond in writing to any comments that known plans for a regionally significant non-federal project have not been properly reflected in the regional emissions analysis; and have recipients of federal funds determine annually that their regionally significant non-federal projects are included in a conforming MTP or TIP, or are included in a regional emissions analysis of the MTP and TIP. The MPO shall consult with project sponsors to determine the non-federal projects' location and design concept and scope to be used in the regional emissions analysis, particularly for projects for which the sponsor does not report a single intent because the sponsor's alternatives selection process is not yet complete. If the MPO assumes a design concept and scope which is different from the sponsor's ultimate choice, the next regional emissions analysis for a conformity determination must reflect the most recent information regarding the project's design concept and scope;

(x) under §114.270 of this title (relating to Transportation Control Measures), ensure the timely implementation of TCMs and report to the commission annually on the status of adopted TCMs. If alternative TCMs or other reduction measures are deemed necessary, and these are not already included in the SIP, the MPO shall develop new TCMs with equal or greater emissions reductions consistent with the MTP, TIP, SIP, and conformity requirements, under §114.270(d) of this title. Any changes in TCMs will be coordinated with the affected agencies specified in paragraph (1)(A) of this subsection;

(xi) cooperatively share the responsibility for conducting conformity determinations on transportation activities which cross the borders of MPOs or nonattainment and maintenance areas. The affected MPOs will enter into a Memorandum of Agreement (MOA) which will define the effective boundary and the respective responsibilities of each MPO for regional emissions analysis. The MPOs will be responsible within their respective metropolitan area boundaries and, at their option, beyond to the boundaries of the nonattainment/maintenance areas, for regional emissions analysis. Adjacent MPOs or nonattainment/maintenance areas or basins will share information concerning air quality modeling assumptions and emission rates that affect both areas; and

(xii) for the purpose of determining the conformity of all projects outside the metropolitan planning area, but within the nonattainment or maintenance area, enter into an MOA involving the MPO and TxDOT for cooperative planning and analysis of projects.

(B) the commission, as the lead air quality planning agency, shall work in consultation with the agencies specified in paragraph (1)(A) of this subsection in developing applicable transportation related SIP revisions, air quality modeling, general emissions analysis, emissions inventory, and all related activities. Specifically, the commission shall:

(i) set agendas and schedule meetings to seek advice and comments from all agencies specified in paragraph (1)(A) of this subsection during preparation of applicable transportation related SIP revisions;

(ii) schedule public hearings in order to gather public input on the applicable transportation-related SIP revisions and notify the agencies specified in paragraph (1)(B) of this subsection of the hearings according to 40 CFR, §51.102;

(iii) provide copies of final documents, including applicable adopted or approved transportation related SIP revisions and supporting information, to all agencies specified in paragraph (1)(B) of this subsection; and

(iv) after consultation with the MPO regarding TCMs under §114.270(a) of this title, distribute to all agencies specified in paragraph (1)(B) of this subsection and other interested persons the list of TCMs proposed for inclusion in the SIP. In consultation with the agencies specified in paragraph (1)(A) of this subsection, the commission shall determine whether past obstacles to implementation of TCMs have been identified and are being overcome, and determine whether the MPOs and the implementing agencies are giving maximum priority to approval or funding for TCMs. Also, the commission shall consider, in consultation with the affected agencies, whether delays in TCM implementation necessitate a SIP revision to remove TCMs or substitute TCMs or other emission reduction measures.

(3) General procedures.

(A) The MPO, TxDOT, or the commission, as applicable, shall respond to comments of affected agencies on MTPs, TIPs, projects, or SIP revisions in accordance with the public involvement procedures that govern the involved action. The MPO, TxDOT, or the commission, as applicable, shall include all comments and the replies to those comments with final documents when they are submitted for adoption by the agency's governing board. In the event that comments are not adequately resolved, the procedures outlined

in paragraph (4) of this subsection regarding conflict resolution shall apply.

(B) Because the validity of the regional emissions analysis depends on transportation modeling assumptions which need periodic updates, the MPO, with the assistance of TxDOT and local publicly owned transit agencies, will conduct meetings with the agencies specified in paragraph (1)(A) of this subsection to cooperatively establish research and data collection efforts and regional model development (e.g., household/transportation surveys).

(C) For the purposes of evaluating and choosing a model (or models) and associated methods and assumptions to be used in Hot-Spot and Regional Emissions Analyses, the commission shall establish a working group identified as the Transportation and Air Quality Technical (TAQT) Working Group. The TAQT Working Group shall include the agencies specified in paragraph (1)(A) of this subsection. The frequency of meetings and agendas for them will be determined by the commission in cooperation with the agencies specified in paragraph (1)(A) of this subsection. The function of this working group may be delegated to an existing group with similar composition and purpose.

(D) The commission, affected MPOs, and TxDOT shall cooperatively evaluate events which will trigger the need for new conformity determinations. New conformity determinations may be triggered by events established in 40 CFR, §51.400 as well as other events, including emergency relief projects that require substantial functional, locational, and capacity changes, or in the event of any other unforeseeable circumstances.

(4) Conflict resolution.

(A) The commission and the MPO (or TxDOT where appropriate) shall make a good-faith effort to address the major concerns of the other party in the event they are unable to reach agreement on the conformity determination of a proposed MTP or TIP. The efforts shall include meetings of the agency executive directors if necessary.

(B) In the event that the MPO or TxDOT determines that every effort has been made to address the commission concerns, and that no further progress is possible, the MPO or TxDOT shall notify the commission executive director in writing to this effect. This subparagraph shall be cited by the MPO or TxDOT in any notification of a conflict which may require action by the Governor, or his or her delegate under subparagraph (C) of this paragraph.

(C) The commission has 14 calendar days from date of receipt of notification as required in subparagraph (B) of this paragraph to appeal to the Governor. If the commission appeals to the Governor, the final conformity determination must then have the concurrence of the Governor. The Governor may delegate his or her role in this process, but not to the commission or staff of the commission, a local air quality agency, the Texas Transportation Commission or staff of TxDOT, or an MPO. This subparagraph shall be cited by the commission in any notification of a conflict which may require action by the Governor or his or her delegate. If the commission does not appeal to the Governor within 14 calendar days from receipt of written notification, the MPO or TxDOT may proceed with the final conformity determination.

(5) Public comment on conformity determinations. Consistent with the requirements of 23 CFR, Part 450 concerning public involvement, the agencies specified in paragraph (1)(A) of this subsection shall establish a public involvement process which provides opportunity for public review and comment prior to taking formal action on conformity determinations for all MTPs and TIPs. In addition, these agencies shall address in writing any public comment claiming that a non-FHWA/FTA funded, regionally significant project has not been properly represented in the conformity determination for a MTP or TIP. Also, these agencies shall provide opportunity for public involvement in conformity determinations for projects where otherwise required by law.

(6) In formulating an enforcement policy regarding a violation of a rule of this subsection (relating to the consultation process) the commission may consider any good faith effort made by the consulting agencies to comply.

§114.270. Transportation Control Measures.

(a) The metropolitan planning organization (MPO) for any designated nonattainment area shall be responsible for the identification, evaluation, coordination, tracking, and periodic revision, as necessary, of transportation control measures (TCMs) required for inclusion in the Texas State Implementation Plan (SIP) adopted by the Texas Natural Resource Conservation Commission (commission). The MPO shall obtain and submit to the commission the necessary commitments from applicable implementing agencies and shall ensure adequate, timely funding of such projects through the development, management, and annual revision of the Transportation Improvement Program (TIP) and, through the long-range transportation plan, ensuring conformity of the regional transportation network with the SIP. Such implementing agency commitments shall include, but not be limited to, the following information:

(1) a complete description of the program of measures and estimated emission reduction benefits from the program of measures adopted;

(2) evidence that the measure was properly adopted by a jurisdiction with legal authority to commit to and execute the program of measures;

(3) evidence that funding has been, or will be, obligated to implement the measure;

(4) evidence that all necessary funding approvals have been obtained from all appropriate implementing agencies, including the Texas Department of Transportation (TxDOT), if applicable; and all parties intend to implement specific control measures upon final environmental clearance. Programming within the TIP will serve as sufficient evidence of commitment.

(5) evidence that a complete schedule to plan, adopt, fund, implement, monitor, and ensure compliance with the TCM has been adopted by the implementing agencies; and

(6) a description of the monitoring program to assess the measure's effectiveness and to allow for necessary in-place corrections or alterations.

(b) MPOs required to comply with the provisions of this rule include the:

(1) El Paso MPO for the El Paso Urban Transportation Study - responsible for the El Paso nonattainment areas, as defined in §101.1 of this title (relating to Definitions);

(2) Houston-Galveston Area Council - responsible for the Houston/Galveston nonattainment area, as defined in §101.1 of this title;

(3) North Central Texas Council of Governments - responsible for the Dallas/ Fort Worth nonattainment area, as defined in §101.1 of this title; and

(4) Southeast Texas Regional Planning Commission - responsible for the Beaumont/ Port Arthur nonattainment area, as defined in §101.1 of this title.

(c) The responsible MPO shall obtain information from implementing agencies responsible for TCMs included in the SIP; shall maintain complete and accurate records for at least five years; and shall make such records available to representatives of the commission, the EPA, the Federal Highway Administration, the Federal Transit Administration, the TxDOT, and local air pollution agencies having jurisdiction in the area, upon request. The information in the records shall be sufficient to accurately reflect the effectiveness of the TCM program and shall include, but not be limited to, the following:

(1) the annual status of the implementation of the program of TCMs and the categories of TCMs, including quantifying progress based on the measurable criteria established in implementing agency commitments;

(2) an annual estimate of the funding and other resources expended toward implementing the program of TCMs and a comparison of the actual and projected expenditures;

(3) an annual estimate of the emission reductions achieved from implementation of the program of TCMs and a comparison of actual and projected reductions; and

(4) any modifications to the program of TCMs since the last annual report and/or projected in the next reporting period to compensate for a short-fall in the implementation of the program of TCMs or in the associated emission reductions.

(d) If information regarding the status of the program of TCMs in the SIP indicates that any TCM included in the SIP has not been adequately implemented in accordance with the projected schedule, the responsible MPO shall within the next 12 months after TIP approval by the MPO or regional transportation policy body:

(1) ensure that the responsible implementing agencies have instituted supplemental efforts as necessary to demonstrate compliance with commitments, future TCM milestones, or goals;

(2) develop, submit, and initiate an alternative TCM in coordination with the same or other responsible implementing agencies, which, as part of the program of TCMs in the SIP, demonstrates at least an equivalent emission reduction, in the same time frame, to the existing program;

(3) initiate a revision the TIP as necessary, but no more frequently than annually, to ensure that sufficient funding and authorization has been provided to correct the deficiency; and

(4) submit to the commission new or modified TCMs as proposed SIP revisions if the alternative TCMs are not within the same category, or if required emission reductions can not be met with the planned alternative TCMs.

(e) If the commission makes a determination that the process described in subsection (d) of this section has not resolved the identified deficiency, or that an egregious or knowing failure to comply with the TCM commitments included in the SIP has occurred, the MPO:

(1) shall amend the TIP to facilitate the expeditious implementation of contingency measures previously identified by the MPO and approved by the commission; and

(2) shall withhold all or part of the funding for non-TCM projects from the applicable implementing agency.

(f) The commission shall seek a financial penalty against the MPO or an implementing agency only in the case of an egregious or knowing violation of the provisions of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 20, 1997.

TRD-9711020
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Proposed date of adoption: November 5, 1997
For further information, please call: (512) 239–1970

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part X. Texas Water Development Board

Chapter 356. Groundwater Management Plan Certification

31 TAC §§356.1–356.9

The Texas Water Development Board (board) proposes new §§356.1-356.9, comprising Chapter 356, concerning procedures for groundwater management plan certification. The new sections establish a review and approval procedure for certifying the statutorily required groundwater management plans of groundwater conservation districts.

Section 356.1 and §356.2 describe the scope of the new chapter and provides definitions to the terms used in the chapter. Section 356.3 requires comprehensive management plans to be submitted by the District. Section 356.4 addresses consistency with an approved regional water plan. Section 356.5 lists elements to be included in the management plan. Section 356.6 sets forth documents that must be submitted for the plan review. Section 356.7 explains the process for certification of the management plan. Section 356.8 provides an appeal process for denied certification. Section 356.9 describes the approval process for amendments.

Ms. Lesa Cochran, Director of Financial Programs, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local

government as a result of enforcing or administering the new sections.

Ms. Cochran also has determined that for each year of the first five years that the sections are in effect the public benefit anticipated as a result of enforcing the sections will be to ensure statutory compliance by groundwater districts in the planning and management of sources of groundwater. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the new sections as proposed.

Comments on the proposed sections will be accepted for 30 days following publication and may be submitted to Suzanne Schwartz, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231.

The new sections are proposed under the authority of the Texas Water Code, §6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

The statutory provisions affected by the new sections are Texas Water Code, Chapter 36, Subchapter D, §§36.1071-36.1073.

§356.1. Scope of Chapter.

This chapter shall govern the board's procedures for reviewing and certifying management plans.

§356.2. Definitions of Terms.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code, Chapter 36 and not defined here shall have the meanings provided in Chapter 36.

Amount of groundwater being used - The quantity of groundwater withdrawn or flowing from an aquifer naturally or artificially on an annual basis.

Approved regional water plan - A water plan developed pursuant to Texas Water Code, §16.053 and which has been approved by the board.

Artificial recharge - Increased recharge accomplished by the modification of the land surface, streams, or lakes to increase seepage or infiltration rates or by the direct injection of water into the subsurface through wells.

Board - Texas Water Development Board.

Conjunctive surface water management issues- Issues relating to the active use of both surface water and groundwater to achieve increased water supply or enhanced water quality.

District - Any district or authority created under Texas Constitution, Article III, §52 or Article XVI, §59 that has the authority to regulate the spacing of water wells, the production from water wells, or both.

Estimates - Reasonable calculations using best available data and methodologies specified in the management plan such that the quantifications can be tracked over time.

Executive administrator - The executive administrator of the board.

Management goals - The qualitative and quantitative ends toward which a district directs its efforts.

Management objectives - Specific, quantifiable, and time-based statements of desired future accomplishments or outcomes, each linked to a management goal, which set the individual priority for district strategies.

Management plan - The groundwater management plan required pursuant to Texas Water Code, §36.1071.

Most efficient use of groundwater - Those practices, techniques and technologies that the district determines will provide the least consumption of groundwater balanced with the benefits of using groundwater.

Performance standards- Indicators or measures, each of which is linked to a management objective, used to evaluate effectiveness and efficiency of district activities by quantifying the results of actions and the impact of the results of activities.

Projected water supply - The usable amount of groundwater available per annum under the district's management plan and the quantity of surface water available per annum during the period covered by the management plan.

Projected water demand - The quantity of water needed per annum for beneficial use during the period covered by the management plan.

Recharge - The addition of water from precipitation or runoff by seepage or infiltration to an aquifer from the land surface, streams, or lakes directly into a formation or indirectly by way of leakage from another formation.

Regional water plan- Regional water plan developed by a regional water planning group in each regional water planning area as provided by Texas Water Code, §16.053.

Surface water management entities- Entities granted authority to store, take, divert, or supply surface water either directly or by contract under Texas Water Code, Chapter 11, for use within the boundaries of a district.

Usable amount of groundwater - The quantity of groundwater of acceptable quality that is contained within the portion of an aquifer covered by a district's management plan and which is economically retrievable for beneficial use.

§356.3. Required Management Plan.

As required by Texas Water Code, §36.1071 and §36.1072, a district shall submit to the executive administrator a management plan that meets the requirements of §356.5 of this title (relating to Required Content of Management Plan). The management plan shall be submitted by existing districts not later than September 1, 1998. For districts created after or which require a confirmation election after September 1, 1997, the management plan shall be submitted not later than two years after the creation of the district or, if the district requires confirmation, not later than two years after the election confirming the district.

§356.4. Consistency with Regional Water Plans.

Management plans must be consistent with the approved regional water plan for each region in which any part of the district is located.

§356.5. Required Content of Management Plan.

(a) The executive administrator shall not certify a management plan unless the plan uses a planning period of at least ten years and contains the following:

(1) management goals, as applicable:

(A) providing the most efficient use of groundwater;

(B) controlling and preventing waste of groundwater;

(C) controlling and preventing subsidence;

(D) addressing conjunctive surface water management issues; and

(E) addressing natural resource issues;

(2) performance standards and management objectives that the district will use to achieve the management goals in paragraph (1) of this subsection;

(3) specifically detailed actions, procedures, performance, and avoidance, including specifications and proposed rules, necessary to effectuate the management plan; and

(4) estimates of:

(A) the existing total usable amount of groundwater in the district;

(B) the amount of groundwater being used within the district on an annual basis;

(C) the annual amount of recharge to the groundwater resources within the district and possible methods for increasing the natural or artificial recharge; and

(D) the projected water supply and demand within the district.

(5) details of how the district will manage groundwater supplies in the district, including a methodology by which a district will track its progress on an annual basis in achieving its management goals.

(b) In addition to the requirements of subsection (a) of this section, the management plan shall address water supply needs in a manner that does not conflict with an approved regional water plan covering any area within the boundaries of the district.

(c) The requirement of subsection (b) of this section may be waived if the executive administrator determines that conditions justify such waiver. Waiver will only be granted upon the written request of the district accompanied by evidence acceptable to the executive administrator in form and substance of conditions justifying such waiver.

§356.6. Plan Submittal.

(a) A district requesting review and certification of its management plan shall submit to the executive administrator the following:

(1) a certified copy of the adopted management plan;

(2) a certified copy of the district's resolution adopting the plan;

(3) evidence that the plan was adopted after notice and hearing;

(4) evidence that the district coordinated in the development of its management plan with surface water management entities; and

(5) evidence of consistency with and any conflict between the proposed management plan and an approved regional water management plan for each region in which any part of the district is located.

(b) The plan or revised plan under §356.7 of this title (relating to Certification) shall be considered submitted to the board when it is received in the Austin offices of the board.

§356.7. Certification.

Within 60 days of receipt of a management plan, the executive administrator shall certify the plan if it complies with the requirements of §356.5 of this title (relating to Required Content of Management Plan) or shall deny certification of the plan if it does not comply with such requirements. Within five days of making a certification determination, the executive administrator shall notify the district in writing of the determination. If certification is denied, the executive administrator shall include written reasons for the denial with the notice of denial. If the executive administrator denies certification, the district may submit a revised management plan for review and certification within 180 days from receipt of notice that the executive administrator has denied certification. The review and certification of a revised management plan must comply with all the requirements of this chapter pertaining to the review and certification of originally submitted management plans.

§356.8. Appeal of Denied Certification.

(a) If the executive administrator denies certification of a management plan or a revised management plan, the district submitting the plan may appeal the denial to the board by notifying the executive administrator in writing of its intent to appeal, not later than 60 days after receipt of the executive administrator's written notice of denial. Not later than 30 days after filing its notice of intent to appeal, a district shall submit to the executive administrator in writing points of appeal addressing each of the executive administrator's reasons for denial of certification. The written points of appeal shall not exceed 50 pages (double spaced, single sided, 8.5" x 11"). The board shall hear the appeal at the first regularly scheduled meeting of the board to occur after the expiration of 30 days from the receipt of the district's written points of appeal. Written notice of appeal and written points of appeal shall be considered to be received by the executive administrator when received in the Austin offices of the Board. The executive administrator may file a written response to the district's points of appeal.

(b) The district shall designate one or more representatives to present the appeal to the board. The district's representatives shall have not more than 20 minutes total to orally present the district's points of appeal to the board at the appropriate time during the meeting set to consider the appeal. After the district presents points the executive administrator or the executive administrator's designee may present an oral response not to exceed 20 minutes in length. The board may extend the presentation time limits. At the close of the executive administrator's response, the district's representative shall be allowed up to five minutes of rebuttal. At the close of rebuttal the board may discuss the matter and direct the executive administrator to either certify or withhold certification of the management plan. The board's decision shall be the final action on certification of the management plan and may not be appealed.

§356.9. Approval of Amendments.

A district shall submit all amendments to the management plan to the board within 60 days of adoption. Within 60 days of receipt of amendments to the management plan, the executive administrator

either shall notify the district that the amendments do not substantially affect the management plan, or shall provide the district with written notification of certification or denial of certification of the plan as amended. The requirements of this chapter apply to any amendment to a district's management plan that substantially affects the management plan.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 21, 1997.

TRD-9711048
Craig D. Pedersen
Executive Administrator
Texas Water Development Board
Proposed date of adoption: October 16, 1997
For further information, please call: (512) 463–7981

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Chapter 363. Financial Assistance Programs

The Texas Water Development Board (the board) proposes amendments to 31 TAC Chapter 363 concerning Financial Assistance Programs. Amendments to §363.33 will allow adjustment of the amount of interest rate subsidy provided in fixed rate lending in the State Revolving Fund programs. The change will only impact loans to borrowers that request unusual debt structuring that significantly varies from the Astandard loan structure@ as defined in the proposed amendment.

This allows the typical borrower to utilize the standard subsidy provided by the current rules without change, while adjusting the subsidy level for the estimated five percent of borrowers effected by the new rule. The new rule adjusts the subsidy of borrowers with special structuring needs, to retain this flexibility, but compensates the Board by adjusting the subsidy to a level which considers the time value of the subsidy in a manner that provides the same dollar amount of subsidy that would be provided had the loan been requested in the Astandard loan structure@.

Amendment to §363.42(a)(2)(A)(iii) will correct a reference to the Development Fund Manager from Development Fund Director.

Ms. Lesa Cochran, Director of Financial Programs, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state government as a result of enforcing or administering the rule. The dollar amount of the effect on local government cannot be determined as it will be dependent on the loan amount and proposed loan structure of future applicants. Some borrowers will experience reduced loan subsidies, but there will be an increase in the total amount of funding at subsidized rates available to all borrowers.

Ms. Cochran also has determined that for each year of the first five years that the rule is in effect the public benefit will be better management of the overall cashflow requirements of the program and more equitable treatment of individual borrowers based on the structure of loans requested. There will not be an effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Greg Olin, Reporting and Systems Manager, 512/463-7872, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231.

Subchapter A. General Provisions

Formal Action by the Board

31 TAC §363.33

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, §15.605 which allows the board to adopt rules necessary for the State Revolving Fund, and §15.606 which requires the board to determine the lending rate for the State Revolving Fund.

Chapter 15, Subchapter J are the statutory provisions affected by the proposed amendments.

§363.33. Interest Rates for Loans and Purchase of Board's Interest in State Participation Projects.

(a)-(b) (No change.)

(c) Interest Rates for Loans from the State Water Pollution Control Revolving Fund.

(1) The fixed interest rates for SRF loans under this chapter are set at a rate 70 basis points below the fixed rate index rates for borrowers, plus an additional reduction under subparagraph (A) or (B) **, or if applicable, are set at the total basis points below the fixed rate index for borrowers derived under subparagraph (C)** of this paragraph. The fixed rate index rates shall be established for each borrower based on the borrower's market cost of funds as they relate to the Delphis Hanover Corporation Range of Yield Curve Scales **(Delphis scales)** or the 90 index of the Delphis Hanover Corporation Scale for borrowers with either no rating or a rating less than investment grade, using individual coupon rates for each maturity of proposed debt based on the appropriate index's scale.

(A)-(B) (No change.)

(C) For borrowers filing applications on or after September 21, 1997 for loans with an average bond life in excess of 14 years or, at the discretion of the board for borrowers filing applications on or after September 21, 1997 for loans which have debt schedules less than 20 years and which produce a total fixed lending rate reduction in excess of a "standard loan structure" (defined as a debt service schedule in which the first year of the maturity schedule is interest only followed by 20 years of principal maturing on the basis of level debt service), the following procedures will be used in lieu of the provisions of subparagraphs (A) and (B) of this paragraph to determine the total fixed lending rate reduction:

(i) **The interest rate component of level debt service will be determined by using the 13th year coupon rate of the appropriate index of the Delphis scales that corresponds to the 13th year of principal of the standard loan structure and**

that is measured from the first business day on the month the loan application will be presented to the board for approval.

(ii) **Level debt service will be calculated using the 13th year Delphis Scale coupon rate as described in clause (i) of this subparagraph and the par amount of the loan according to a standard loan structure. For a loan which has been proposed for a term of years equal to a standard loan structure, the dates specified in the loan application shall be used for interest and principal calculation. For a loan which has been proposed for a term of years less than a standard loan structure or longer than a standard loan structure, level debt service will be calculated beginning with the dated date and based upon the principal and interest dates specified in the application, and continuing for the term of a standard loan structure.**

(iii) **A calculation will be made to determine how much a borrower's interest would be reduced if the loan had been made according to the total fixed lending rate reduction provided in subparagraph (A) or (B) of this paragraph as chosen by the borrower, and based upon the principal payments calculated in clause (ii) of this subparagraph.**

(iv) **The board will establish a total fixed lending rate reduction for the loan that will achieve the interest savings in clause (iii) of this subparagraph based upon the principal schedule proposed by the borrower.**

(2)-(3) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711269
Craig D. Pedersen
Executive Administrator
Texas Water Development Board
Proposed date of adoption: October 16, 1997
For further information, please call: (512) 463–7981

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Prerequisites to Release of State Funds

31 TAC §363.42

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, §15.605 which allows the board to adopt rules necessary for the State Revolving Fund, and §15.606 which requires the board to determine the lending rate for the State Revolving Fund.

Chapter 15, Subchapter J are the statutory provisions affected by the proposed amendments.

§363.42. Loan Closing.

(a) Instruments needed for closing. The documents which shall be required at the time of closing shall include the following:

(1) (No change.)

(2) certified copy of the ordinances or resolutions adopted by the governing body authorizing issuance of debt sold to the board which has received prior approval by the executive administrator and which shall have sections providing:

(A) that an escrow account, if applicable, shall be created which shall be separate from all other funds and that:

(i)-(ii) (No change.)

(iii) the escrow account bank statements or trust account statement will be provided on a monthly basis to the Development Fund **Manager's** [director's] office; and

(iv) (No change.)

(B)-(I) (No change.)

(3)-(7) (No change.)

(b)-(c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711270
Craig D. Pedersen
Executive Administrator
Texas Water Development Board
Proposed date of adoption: October 16, 1997
For further information, please call: (512) 463–7981

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Chapter 371. Drinking Water State Revolving Fund

Board Action on Application

31 TAC §371.52

The Texas Water Development Board (the board) proposes amendments to 31 TAC Chapter 371 concerning the Drinking Water State Revolving Fund. Amendments to 371.52(b) will allow adjustment of the amount of interest rate subsidy provided in fixed rate lending in the State Revolving Fund programs. The change will only impact loans to borrowers that request unusual debt structuring that significantly varies from the Astandard loan structure@ as defined in the proposed amendment.

This allows the typical borrower to utilize the standard subsidy provided by the current rules without change, while adjusting the subsidy level for the estimated five percent of borrowers effected by the new rule. The new rule adjusts the subsidy of borrowers with special structuring needs, to retain this flexibility, but compensates the Board by adjusting the subsidy to a level which considers the time value of the subsidy in a manner that provides the same dollar amount of subsidy that would be provided had the loan been requested in the Astandard loan structure@.

Amendment to §371.52(d) will correct a reference to the Development Fund Manager from Development Fund Director.

Ms. Lesa Cochran, Director of Financial Programs, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state government as a result of enforcing or administering the rule. The dollar amount of the effect on local government cannot be determined as it will be dependent on the loan amount and proposed loan structure of future applicants. Some borrowers will experience reduced loan subsidies, but there will be an increase in the total amount of funding at subsidized rates available to all borrowers.

Ms. Cochran also has determined that for each year of the first five years that the rule is in effect the public benefit will be better management of the overall cashflow requirements of the program and more equitable treatment of individual borrowers based on the structure of loans requested. There will not be an effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Greg Olin, Reporting and Systems Manager, 512/463-7872, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231.

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, and §15.6041 and §15.605 which provide the board authority to adopt rules for the Drinking Water State Revolving Fund.

Chapter 15, Subchapter J are the statutory provisions affected by the proposed amendments.

§371.52. Lending Rates.

(a) (No change.)

(b) Fixed Rates. The fixed interest rates for DWSRF loans under this chapter are set at rates 120 basis points below the fixed rate index rates for borrowers plus an additional reduction under paragraph (1) or (2)**, or if applicable, are set at the total basis points below the fixed rate index for borrowers derived under paragraph (3)** of this subsection. Using individual coupon rates for each maturity of proposed debt based on the appropriate index's scale, the fixed rate index rates shall be established for each borrower based on the borrower's market cost of funds as they relate to the Delphis Hanover Corporation Range of Yield Curve Scales **(Delphis scales)** or the 90 index of the Delphis Hanover Corporation Scale. For borrowers with either no rating or a rating less than investment grade, the 90 index of the Delphis Hanover Corporation Scale will apply.

(1)-(2) (No change.)

(3) For borrowers filing applications on or after September 21, 1997 for loans with an average bond life in excess of 14 years or, at the discretion of the board for borrowers filing applications on or after September 21, 1997 for loans which have debt schedules less than 20 years and which produce a total fixed lending rate reduction in excess of a "standard loan structure" (defined as a debt service schedule in which the first year of the maturity schedule is interest only followed by 20 years of principal maturing on the basis of level debt service), the following procedures will be used in lieu of the provisions of paragraphs (1) and (2) of this subsection to determine the total fixed lending rate reduction:

(A) The interest rate component of level debt service will be determined by using the 13th year coupon rate of the appropriate index of the Delphis scales that corresponds to the 13th year of principal of the standard loan structure and that is measured from the first business day on the month the loan application will be presented to the board for approval.

(B) Level debt service will be calculated using the 13th year Delphis Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan according to a standard loan structure. For a loan which has been proposed for a term of years equal to a standard loan structure, the dates specified in the loan application shall be used for interest and principal calculation. For a loan which has been proposed for a term of years less than a standard loan structure or longer than a standard loan structure, level debt service will be calculated beginning with the dated date and based upon the principal and interest dates specified in the application, and continuing for the term of a standard loan structure.

(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan had been made according to the total fixed lending rate reduction provided in paragraph (1) or (2) of this subsection as chosen by the borrower, and based upon the principal payments calculated in subparagraph (B) of this paragraph.

(D) The board will establish a total fixed lending rate reduction for the loan that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.

(c) (No change.)

(d) The Development Fund **Manager** [Director] may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711273
Craig D. Pedersen
Executive Administrator
Texas Water Development Board
Proposed date of adoption: October 16, 1997
For further information, please call: (512) 463–7981

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Chapter 375. State Water Pollution Control Revolving Fund

Board Action on Application

31 TAC §375.52

The Texas Water Development Board (the board) proposes amendments to 31 TAC Chapter 375 concerning the State Water Pollution Control Revolving Fund. Amendments to

§375.52(b) will allow adjustment of the amount of interest rate subsidy provided in fixed rate lending in the State Revolving Fund programs. The change will only impact loans to borrowers that request unusual debt structuring that significantly varies from the Astandard loan structure as defined in the proposed amendment.

This allows the typical borrower to utilize the standard subsidy provided by the current rules without change, while adjusting the subsidy level for the estimated five percent of borrowers effected by the new rule. The new rule adjusts the subsidy of borrowers with special structuring needs, to retain this flexibility, but compensates the Board by adjusting the subsidy to a level which considers the time value of the subsidy in a manner that provides the same dollar amount of subsidy that would be provided had the loan been requested in the Astandard loan structure.

Amendments to §375.52(d) and §375.72(a)(2)(A)(iii) will correct references to the Development Fund Manager from Development Fund Director.

Ms. Lesa Cochran, Director of Financial Programs, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state government as a result of enforcing or administering the rule. The dollar amount of the effect on local government cannot be determined as it will be dependent on the loan amount and proposed loan structure of future applicants. Some borrowers will experience reduced loan subsidies, but there will be an increase in the total amount of funding at subsidized rates available to all borrowers.

Ms. Cochran also has determined that for each year of the first five years that the rule is in effect the public benefit will be better management of the overall cashflow requirements of the program and more equitable treatment of individual borrowers based on the structure of loans requested. There will not be an effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Greg Olin, Reporting and Systems Manager, 512/463-7872, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231.

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, §15.605 which allows the board to adopt rules necessary for the State Revolving Fund, and §15.606 which requires the board to determine the lending rate for the State Revolving Fund.

Chapter 15, Subchapter J are the statutory provisions affected by the proposed amendments.

§375.52. Lending Rates.

(a) (No change.)

(b) Fixed Rates. The fixed interest rates for SRF loans under this chapter are set at rates 120 basis points below the fixed rate index rates for borrowers plus an additional reduction under paragraph (1) or (2)**, or if applicable, are set at the total basis points below the fixed rate index for borrowers derived under paragraph (3)** of this subsection. The fixed rate index rates shall be established for each borrower based on the borrower's market cost of funds as they relate to the Delphis Hanover Corporation Range of Yield Curve Scales **(Delphis scales)** or the 90 index of the Delphis Hanover Corporation Scale for borrowers with either no rating or a rating less than investment grade, using individual coupon rates for each maturity of proposed debt based on the appropriate index's scale.

(1)-(2) (No change.)

(3) For borrowers filing applications on or after September 21, 1997 for loans with an average bond life in excess of 14 years or, at the discretion of the board for borrowers filing applications on or after September 21, 1997 for loans which have debt schedules less than 20 years and which produce a total fixed lending rate reduction in excess of a "standard loan structure" (defined as a debt service schedule in which the first year of the maturity schedule is interest only followed by 20 years of principal maturing on the basis of level debt service), the following procedures will be used in lieu of the provisions of paragraphs (1) and (2) of this subsection to determine the total fixed lending rate reduction:

(A) The interest rate component of level debt service will be determined by using the 13th year coupon rate of the appropriate index of the Delphis scales that corresponds to the 13th year of principal of the standard loan structure and that is measured from the first business day on the month the loan application will be presented to the board for approval.

(B) Level debt service will be calculated using the 13th year Delphis Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan according to a standard loan structure. For a loan which has been proposed for a term of years equal to a standard loan structure, the dates specified in the loan application shall be used for interest and principal calculation. For a loan which has been proposed for a term of years less than a standard loan structure or longer than a standard loan structure, level debt service will be calculated beginning with the dated date and based upon the principal and interest dates specified in the application, and continuing for the term of a standard loan structure.

(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan had been made according to the total fixed lending rate reduction provided in paragraph (1) or (2) of this subsection as chosen by the borrower, and based upon the principal payments calculated in subparagraph (B) of this paragraph.

(D) The board will establish a total fixed lending rate reduction for the loan that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.

(c) (No change.)

(d) The Development Fund **Manager** [Director] may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711271
Craig D. Pedersen
Executive Administrator
Texas Water Development Board
Proposed date of adoption: October 16, 1997
For further information, please call: (512) 463–7981

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Prerequisites to Release of Funds

31 TAC §375.72

The Texas Water Development Board (the board) proposes amendments to 31 TAC Chapter 375 concerning the State Water Pollution Control Revolving Fund. Amendments to §375.52(b) will allow adjustment of the amount of interest rate subsidy provided in fixed rate lending in the State Revolving Fund programs. The change will only impact loans to borrowers that request unusual debt structuring that significantly varies from the Astandard loan structure@ as defined in the proposed amendment.

This allows the typical borrower to utilize the standard subsidy provided by the current rules without change, while adjusting the subsidy level for the estimated five percent of borrowers effected by the new rule. The new rule adjusts the subsidy of borrowers with special structuring needs, to retain this flexibility, but compensates the Board by adjusting the subsidy to a level which considers the time value of the subsidy in a manner that provides the same dollar amount of subsidy that would be provided had the loan been requested in the Astandard loan structure@.

Amendments to §375.52(d) and §375.72(a)(2)(A)(iii) will correct references to the Development Fund Manager from Development Fund Director.

Ms. Lesa Cochran, Director of Financial Programs, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state government as a result of enforcing or administering the rule. The dollar amount of the effect on local government cannot be determined as it will be dependent on the loan amount and proposed loan structure of future applicants. Some borrowers will experience reduced loan subsidies, but there will be an increase in the total amount of funding at subsidized rates available to all borrowers.

Ms. Cochran also has determined that for each year of the first five years that the rule is in effect the public benefit will be better management of the overall cashflow requirements of the program and more equitable treatment of individual borrowers based on the structure of loans requested. There will not be an effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the amendments as proposed.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Greg Olin, Reporting and Systems Manager, 512/463-7872, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231.

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, §15.605 which allows the board to adopt rules necessary for the State Revolving Fund, and §15.606 which requires the board to determine the lending rate for the State Revolving Fund.

Chapter 15, Subchapter J are the statutory provisions affected by the proposed amendments.

§375.52. Lending Rates.

(a) (No change.)

(b) Fixed Rates. The fixed interest rates for SRF loans under this chapter are set at rates 120 basis points below the fixed rate index rates for borrowers plus an additional reduction under paragraph (1) or (2)**, or if applicable, are set at the total basis points below the fixed rate index for borrowers derived under paragraph (3)** of this subsection. The fixed rate index rates shall be established for each borrower based on the borrower's market cost of funds as they relate to the Delphis Hanover Corporation Range of Yield Curve Scales **(Delphis scales)** or the 90 index of the Delphis Hanover Corporation Scale for borrowers with either no rating or a rating less than investment grade, using individual coupon rates for each maturity of proposed debt based on the appropriate index's scale.

(1)-(2) (No change.)

(3) For borrowers filing applications on or after September 21, 1997 for loans with an average bond life in excess of 14 years or, at the discretion of the board for borrowers filing applications on or after September 21, 1997 for loans which have debt schedules less than 20 years and which produce a total fixed lending rate reduction in excess of a "standard loan structure" (defined as a debt service schedule in which the first year of the maturity schedule is interest only followed by 20 years of principal maturing on the basis of level debt service), the following procedures will be used in lieu of the provisions of paragraphs (1) and (2) of this subsection to determine the total fixed lending rate reduction:

(A) The interest rate component of level debt service will be determined by using the 13th year coupon rate of the appropriate index of the Delphis scales that corresponds to the 13th year of principal of the standard loan structure and that is measured from the first business day on the month the loan application will be presented to the board for approval.

(B) Level debt service will be calculated using the 13th year Delphis Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan according to a standard loan structure. For a loan which has been proposed for a term of years equal to a standard loan structure, the dates specified in the loan application shall be used for interest and principal calculation. For a loan which has been proposed for a term of years less than a standard loan structure or longer than a standard loan structure, level debt service will be calculated beginning with the dated date and based upon the principal and interest dates specified in the application, and continuing for the term of a standard loan structure.

(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan had been made according to the total fixed lending rate reduction provided in paragraph (1) or (2) of this subsection as chosen by the borrower, and based upon the principal payments calculated in subparagraph (B) of this paragraph.

(D) The board will establish a total fixed lending rate reduction for the loan that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.

(c) (No change.)

(d) The Development Fund **Manager** [Director] may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711272
Craig D. Pedersen
Executive Administrator
Texas Water Development Board
Proposed date of adoption: October 16, 1997
For further information, please call: (512) 463–7981

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TITLE 34. PUBLIC FINANCE

Part I. Comptroller of Public Accounts

Chapter 3. Tax Administration

Subchapter J.J. Advertising Fee

34 TAC §3.1201

The Comptroller of Public Accounts proposes new §3.1201, concerning the fee for outdoor advertising of cigarettes or tobacco products and the imposition of an administrative penalty for a violation of the Act. The 75th Legislature, 1997, in Senate Bill 55, amended the Health and Safety Code, Chapter 161, to require a purchaser of advertising to be liable for a fee based on the gross sales price of any outdoor advertising of cigarettes or tobacco products in this state. Additionally, the comptroller may impose an administrative penalty against a purchaser who violates a section or rule associated with the Act.

Mike Reissig, chief revenue estimator, has determined that for the first five-year period the rule will be in effect there will be no significant revenue impact on the state or local government.

Mr. Reissig also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be in providing new information regarding tax responsibilities. This rule is adopted under the Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Karey W. Barton, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This new section is proposed under the Tax Code, §111.002 and §111.0022, which provide the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions assigned to the comptroller by law.

The new section implements the Health and Safety Code, §§161.121, 161.123, 161.125.

§3.1201. Fee for Outdoor Advertising of Cigarettes or Tobacco Products.

(a) Definitions. The following words and terms, when used in this section shall have the following meanings, unless the context clearly indicates otherwise.

(1) Cigarettes - This term has the meaning assigned by Tax Code, §154.001.

(2) Gross sales price - The sum of:

(A) production costs, including the cost of design, artwork, paper, and materials;

(B) media costs, including the cost for leasing billboards, or any other outdoor space where a message or sign is displayed; and

(C) cost of sales or commissions paid to an agency or broker.

(3) Outdoor advertising - A medium, including a structure, display, light device, figure, painting, drawing, message, plaque, poster, sign, or billboard, that:

(A) is used to advertise or to inform;

(B) is visible from the main-traveled way of a street or highway; and

(C) does not include:

(i) a medium displayed inside a building, even if the medium is visible from outside the building; or

(ii) a medium that displays the name of the business, unless that medium also contains a cigarette or tobacco product trade mark, brand or trade name, or logo type.

(4) Purchase - A transaction, including:

(A) an installment and credit purchase;

(B) an exchange of service for service or money;

(C) a signed contract between a purchaser and a seller; and

(D) any other transaction that is the functional equivalent of a purchase.

(5) Tobacco product - This term has the meaning assigned by the Tax Code, §155.001.

(b) Fee imposed. A fee is imposed on each purchaser of outdoor advertising in an amount that is equal to 10% of the gross sales price of any outdoor advertising of cigarettes or tobacco products in this state.

(c) Reporting period. A purchaser of outdoor advertising for cigarettes or tobacco products shall file a report on or before the 20th day of the month following the end of the calendar quarter in which the advertising was purchased.

(1) Except as provided in paragraph (2) of this subsection, the calendar quarter report due dates and the corresponding reporting periods are:
Figure: 34 TAC 3.1201(c)(1)

(2) The first report due will cover the period of September 1, 1997, through December 31, 1997. The due date for the report due October 20, 1997, is extended to January 20, 1998.

(d) Report forms. Each purchaser must report the outdoor advertising fee on the Texas cigarettes or tobacco products outdoor advertising fee report as prescribed by the comptroller. The fact that a purchaser does not receive the form or does not receive the correct form from the comptroller for the filing of the report does not relieve the purchaser of the responsibility of filing a report and paying the required fee.

(e) Payment of the fee. On or before the 20th day of the month following each reporting period, every purchaser shall remit the total fee amount due.

(f) Records required.

(1) Invoices, purchase contracts, installment or credit agreements, or any other records relating to the outdoor advertising purchase must be kept by the purchaser for at least four years after the date of the purchase.

(2) Any records or equipment of any person liable for the fee must be made available to the comptroller or the comptroller's representative for examination to verify the accuracy of any report made or to determine the fee liability in the event no report is filed.

(3) Each purchaser must maintain records showing:

(A) the location at which outdoor advertising is displayed in this state;

(B) the date on which the advertising was purchased;

(C) the gross sales price paid for outdoor advertising displayed in this state; and

(D) if outdoor advertising is purchased for display in more than one state, information to support an allocation to Texas of the appropriate portion of the total amount paid.

(g) Penalty and interest.

(1) A purchaser who does not file a report as provided by subsection (c) of this section, shall pay a penalty of 5.0% of the amount of the fee due and payable. If the purchaser does not file the report and pay the fee before the 30th day after the date on which the fee or report is due, the person shall pay a penalty of an additional 5.0% of the amount of the fee due and payable.

(2) The provisions of the Tax Code, Chapter 101 and Chapters 111 through 113, apply to the administration, payment, collection, and enforcement of fees imposed under this section, in the same manner as those chapters and sections apply to the administration, payment, collection, and enforcement of taxes imposed under the Tax Code, Title 2.

(h) Administrative penalties.

(1) The Health and Safety Code, §161.125 provides that the comptroller, by order, may impose an administrative penalty against a purchaser of advertising required to comply with Health and Safety Code, §161.123, who violates that section or a rule or order adopted under that section.

(2) The administrative penalty for a violation may be in an amount not to exceed $5,000. Each day a violation continues or occurs is a separate violation for the purpose of imposing a penalty.

(3) The amount of the administrative penalty shall be based on:

(A) the amount of fees due and owing;

(B) the attempted concealment of misconduct by the person who committed the violation;

(C) premeditated misconduct by the person who committed the violation;

(D) intentional misconduct by the person who committed the violation;

(E) the motive of the person who committed the violation;

(F) prior misconduct of a similar or related nature by the person who committed the violation;

(G) prior written warnings from any government agency or official regarding statutes or regulations pertaining to the misconduct;

(H) violation by the person who committed the violation of an order of the comptroller;

(I) lack of rehabilitative potential or likelihood for future misconduct of a similar nature;

(J) relevant circumstances increasing the seriousness of the misconduct; and

(K) any other matter justice may require.

(4) Imposition of administrative penalty. A purchaser of outdoor advertising who violates any part of the Health and Safety Code, §161.123 or a rule adopted under that section, will be subject to an administrative penalty and will be notified of the reasons for the penalty. The recourse for a purchaser who does not agree with the imposed administrative penalty will be governed by the provisions of the Tax Code, Chapter 111, the Government Code, Chapter 2001, and §§1.1- 1.42 of this title (relating to Practice and Procedure).

(5) If the comptroller by order finds that a violation has occurred and imposes an administrative penalty, the comptroller shall give notice of the order to the person. The notice must include a statement of the rights of the person to judicial review of the order.

(6) If the purchaser of outdoor advertising does not pay the amount of the administrative penalty, the comptroller may refer the matter to the attorney general for collection of the amount of the penalty.

(7) A penalty collected under this section shall be deposited in the general revenue fund.

(i) Effective date. The fee is imposed on all outdoor advertising of cigarettes or tobacco products purchased after August 31, 1997.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711332
Martin Cherry
Chief, General Law
Comptroller of Public Accounts
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 463–3699

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Part XI. Fire Fighter's Pension Commission

Chapter 301. Rules and Regulations of the Texas Statewide **Emergency Services** [Volunteer Fire Fighter's] Retirement Fund

34 TAC §§301.1-301.5, 301.9, 301.10, 301.11

The Fire Fighter's Pension Commission proposes amendments to §§301.1-301.5, §301.9, §301.10 and new §301.11, concerning Rules and Regulations of the Texas Statewide Emergency Services Retirement Fund. The sections are being amended to include other emergency services personnel in addition to the volunteer fire fighters. Throughout the sections the words "fire fighter" are deleted and the word "member" is added to include other volunteer personnel in the retirement fund. New §301.11 is added to incorporate a Qualified Domestic Relations Order, which includes a form that is adopted by reference.

Elaine Rummel, Program Administrator, has determined that for the first-five year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Rummel also has determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing these rules will be better guidelines under which each local pension board may effectively function and participate in the pension fund. There is no anticipated economic costs to persons who are required to comply with these rules and regulations as proposed.

Comments on the proposal may be submitted to Elaine Rummel, Program Administrator, Fire Fighters Pension Commission, P.O. Box 12577, Austin, Texas 78711.

The amendments and new rule are proposed under Texas Civil Statutes, Article 6243e3, (Senate Bill 411) 65th Legislature (1977), revised in the 72nd Legislature (1991), and revised in the 75th legislature (1997), which provide the Fire Fighters' Pension Commission with the authority to promulgate rules necessary for the administration of the pension fund.

No other statutes, articles, or codes are affected by the proposed rules.

§301.1. Definitions.

The following words and terms, when used in this part, shall have the following meanings, unless the context clearly indicates otherwise.

Active - Refers to a member so determined by the local board based on regular availability until terminated. A **member emergency services** [fire] department must pay dues on individual **members** [fire fighters] even if they do not attend enough **emergencies,** fires and drills to earn time toward retirement, because the fund is responsible for his/her death and/or disability benefits even if he/she only attends one **emergency** [fire] or drill a year. This obligation is terminated when the department notifies the agency of the **member's** [fire fighter's] termination from the pension system.

Disabled - Refers to a member decided disabled by the local board. The causative disability may include mental impairment. Such disability shall be deemed ceased:

(A) Upon a doctor's determination that the member can perform his/her duties as **an emergency service member** [a fire fighter] or the duties of any other occupation for which the person is reasonably suited by education, training, and experience. Both criteria must be met to claim a disability.

(B)-(C) (No change.)

Emergencies [Fires] and Drills -

(A) **Emergency** [Fire] - **An emergency** [A fire] determined by the local board to be included on the Annual Report. The local board may substitute the duties performed by the **member** [fire fighter member] for actual **emergencies** [fires].

(B) Number of drills per year will be changed to number of drill hours per year effective January 1, 1998, §21(b), Duties of the State Board of Trustees, in the pension fund law book. The department's calendar year 1997 annual report will use 24 drills per year.

(C) [(B)] A **member** [fire fighter] who misses a drill(s) **or drill hours** while in recognizable certified [fire] training or education, may count that training or education for that week's drill if the local board approves.

(D) [(C)] If a department does not hold at least 24 drills **48 hours (effective January 1, 1998) in a calendar year,** no member will receive credit toward retirement for the year.

(E) [(D)] Until January 1, 1981, a **member**[fire fighter] had to make 60% of the drills.

(F) [(E)] A department may hold more drills **(or drill hours)** than required by law, but a **member** [fire fighter] only has to make 40% of the **number**[24] required. All members of the department must attend [fire] drills.

(G) A department must schedule drills and drill hours (effective January 1,1998) so that members entering or leaving the department during the calendar year have the ability to attend the required percentage during the calendar year.

(H) Emergencies must be prorated for members entering and leaving the department during the calendar year.

(I) All decisions by the local board regarding what constitutes an emergency, excused absences from emergencies, and all other pension matters should be documented in the local board's meeting minutes and kept on file by the local board.

Leave of absence - There is no leave of absence under Senate Bill 411. A **member** [fire fighter] is either active and dues are being paid; or the **member** [fire fighter] is terminated and no dues are paid. The suggested procedure is to terminate the **member** [fire fighter] if the absence is for an extended period of time and reinstate when the **member**[fire fighter] returns to the pension system. The exception is absence caused by military duty which does not affect qualified service.

Military Duty - Called for military duty during a war or national emergency. The member is given credit for emergencies and drills and the governing body does not have to pay dues during that time. If the member is killed during the time he/she is called up, the system pays the lump sum off-duty death benefits to any beneficiary and a monthly pension to the spouse if applicable.

On-duty death - Refers to a death incurred in the course of the performance of duties as a **member** [fire fighter].

On-duty disability - Refers to a disability incurred in the course of the performance of duties as a **member** [fire fighter].

Physical Fitness - Effective September 1, 1991, §8, Certification of Physical Fitness, of the pension fund law, Texas Statewide Volunteer Fire Fighters' Retirement Act, was amended so that those members of the department not physically fit to **participate in emergency services** [fight fires] could remain in the system and earn credit toward retirement. **The local board decides on the type of physical it feels meets the department's needs.**

(A) (No change.)

(B) The local board must notify the agency if a member cannot **participate in emergency services** [fight fires].

(C) A **member** [fire fighter] who cannot **participate in emergency services** [fight fires] should be assigned to **support** [other] duties to earn credit on the Annual Report.

(D) (No change.)

(E) Effective September 1, 1997, §2A, Membership, paragraphs (b)(4) and (c) in the pension fund law book added that a person is not a member of the pension system if the person does not receive a certification of physical fitness or assignment to support duties under §8, Certification of Physical Fitness, of the pension fund law, Texas Statewide Volunteer Fire Fighters' Retirement Act. This does not mean that the local board of trustees may ignore §8, Certification of Physical Fitness, of the pension fund law, Texas Statewide Volunteer Fire Fighters' Retirement Act and maintain a department of emergency services personnel who do not have physicals and are not in the pension system. Any person over the age of 18 who is not retired from the pension system, and who does not receive a certification of physical fitness or assignment to support duties, must be terminated from the department.

Temporary disability -

(A) A disability which, in the opinion of a physician, may be subject to improvement although in the interim rendering the **member** [fire fighter] unable to perform his/her duties as a **member** [fire fighter] or the duties of any other occupation for which the person is reasonably suited by education, training, and experience.

(B) If the doctor's statement says that a disability is permanent or will last more than three months, the **member** [fire fighter] does not have to submit a new statement every three months. It is the responsibility of the local board to keep this office informed of the status of the disability. The governing body will continue to pay dues on a **member** [fire fighter] on temporary disability. No dues are paid for a **member** [fire fighter] on permanent disability since that person is considered to be on a disability-retirement.

§301.2. Scope.

(a) Applicability. **Until September 1, 1997, the** [This] retirement fund (Senate Bill 411) **applied** [applies] to any political subdivision that contains an entire rural fire prevention district. It also **applied** [applies] when an entire rural fire prevention district **was** [is] contained within more than one governing body, in which case the public agencies **made** [shall make] equal contributions. The public agency **could** [may] be a town.

(1) If a rural fire prevention district **was** [is] located within a county the county **was** [is] the political subdivision. If no rural fire prevention district **was** [is] located within a particular county, the statute **was** [is] not applicable to that county.

(2) A school district **constituted** [constitutes] a political subdivision.

(3) If an unincorporated town **was** [is] located in a county which **had** [has] no rural fire prevention district, there **was** [is] no political subdivision to contribute to the fund and the statute **was** [is] not applicable.

(4) Where a water district **was** [is] located within the unincorporated town, the water district **could** [may] constitute the political subdivision, if a rural fire prevention district **was** [is] located wholly within it.

(5) If both county and water district **met** [meet] the definition, then both **could** [may] be required to contribute.

(6) If the rural fire prevention district **was** [is] situated within the town, the district **was** [is] a political subdivision required to contribute.

(b) Effective September 1, 1997, the definition of governing body was any political subdivision of the state. If the participating department is situated in more than one political subdivision, the governing bodies of such political subdivisions shall contribute equally toward a total of at least $12 for each member for each month of service.

(c) Governing Body/Emergency Services Districts.

(1) An emergency services district which is composed of members of a department which has been in Texas Local Fire Fighters' Retirement Act (TLFFRA House Bill 258) must inform the commission of this at the time they request entrance in Senate Bill 411. Being an emergency services district does not negate the legal obligations which have arisen as a result of being a member of TLFFRA.

(2) By law if a department is more than one political subdivision each shall contribute equally toward the cost for each member's service. It is the responsibility of the department and the governing bodies to inform the commissioner if this section of the law applies.

(3) An emergency services district which is composed of the members of a city emergency services department which has been in TLFFRA cannot be forced to assume the liability of

the TLFFRA payees. If the district refuses to accept the payment of this liability the district can not be in Senate Bill 411.

(4) A department which enters the system with the city as governing body and subsequently becomes governed by an emergency services district will, for pension purposes, continue with the city as governing entity until such time as the district enters into a contract with the pension system, The district and the city may contribute equally toward the total if applicable.

(d) [(b)] Exemption.

(1) This retirement fund need not apply to a public agency whose governing body exempted itself from its operation within 60 days of August 28, 1977. The requirement to provide for participation in the fund pertains to all other public agencies whose governing bodies did not choose to exempt themselves prior to October 28, 1977.

(2) If a governing body acts to rescind its order exempting itself from **the Texas Statewide Volunteer Fire Fighter's Retirement Act (the Act)** [the act], its action will amount to a repeal; and the governing body will begin making its contributions at the time the recession becomes effective.

(3) If the public agency's governing body did not exempt itself, the **emergency services** [fire] department will be admitted to the pension system after they vote to enter the system as required by §10, Entering The Pension System; Required Election. The department's entrance date cannot pre-date the election. The governing body will be held liable for funding as though they rescinded the exemption.

(e) Effective September 1, 1997 a department which is participating in Senate Bill 411 at that date has 60 days to exempt itself from providing additional coverage to other volunteer or auxiliary emergency service personnel who were not eligible for coverage under the original provisions of the Act.

(1) This exemption must be exercised within 60 days after the general effective date of this Act.

(2) Governing bodies who elect to cover these members will provide proof of service as required by the Fire Fighter's Pension Commission.

(3) Governing bodies must pay for the emergency services personnel's contributions (dues) at this time, but in this instance only it will be straight cost without the actuarial factor (interest) added in.

(4) The governing body will pay the cost in one lump sum payment . If this cost cannot be paid in full in one lump sum payment at the time of contracting for coverage, any unpaid costs may be paid in full within three years or may be made in a manner to which the commissioner agrees.

(5) This service will be considered future service if it occurred after the department's entrance date in the system.

(f) [(c)] Eligibility of a Public Agency. A **department** [public agency], to enter into this retirement fund, must have ten active **members** [volunteer fire fighters]. A subsequent drop of the number of active members will not affect eligibility.

(g) [(d)] Member Departments Which Cease to Exist. The commissioner shall continue to administer benefits of the pension system for members and retirees who performed service for a former member fire department that has not withdrawn from the pension system under §12, Withdrawing from the Pension System, of this act **but** [and] has ceased to exist. The governing body will perform the duties of the local board. **(Became part of the pension fund law September 1, 1997, §12(a), Withdrawing from the Pension System.)**

(h) [(e)] Merger. The decision to merge into the Senate Bill 411 plan may be made by a vote of the qualified members who participated in the **emergency services** [fire] department for at least one year. Each qualified member is entitled to cast one vote for each full year of participation. The governing body of the merging public agency is to provide verification of service with the Fire Fighters' Pension Commission as required by the commission. If no record of prior service exists with the Fire Fighters' Pension Commission, the local board is to verify service for each prospective member. This verification is to be signed by the **chief or head of the department** [fire chief] and the representatives of the local board, notarized and returned to the commission office.

(i) [(f)] Non-TLFFRA Departments. Entities which have not been in any pension system prior to entering Senate Bill 411 follow the same procedures as entities in the Texas Local Fire Fighters' Retirement Fund (TLFFRA, formerly House Bill 258) on voting to enter this pension system and follow the same rules and regulations **as departments merging into this system from TLFFRA**.

(j) [(g)] Individual Eligibility.

(1) Status. Qualified [volunteer] members of a [fire] department, whether involved in prevention, suppression, investigation, maintenance, or clerical work are eligible to participate in the retirement fund provided, however, that the member's eligibility to join is dependent on the status of the public agency under whose control he/she is. The prospective member cannot override the public agency's status simply by the payment of contributions. The following are specifically barred as members of the pension system:

(A) If the person is **less than 18 years of age** [a minor].

(B) If the person is retired under this Act (after September 1, 1989), whether or not the person continues to participate in **emergency** [fire] related functions **for the department from which the member retired**. [For the exception see paragraph (6)(A)(ii) of this subsection].

(C) If the person is a probationary member for whom dues are not being paid . **The maximum period during which dues are not paid is six months. Entry dates can not be back dated to cover the probationary period unless all prospective members are covered from the date entered fire department.**

(D) If the person does not receive a certification of physical fitness or assignment to support duties, that person cannot be a member of the department.

(2) EMS. **Until September 1, 1997, members** [Members] of the local EMS Service **could** [may] be included in the pension system if they **met** [meet] all three of the following criteria:

(A) **If they were**[They are] considered by the governing entity to be part of the fire department.

(B) They **were** [are] volunteers.

(C) They **attended** [attend] the fire drills as specified in §1, paragraph (1), of the pension fund law.

(D) Effective September 1, 1997, the law was amended to allow "auxiliary employees". It is the responsibility of the local department to determine that its members comply with the definitions for volunteer and auxiliary members as outlined by the law.

(3) Fair Labor Standards Act (FLSA).

(A) The Federal Fair Labor Standards Act of 1985 specifically defines who a volunteer [fire fighter] is and what this volunteer [fire fighter] can do. According to FLSA, when a [fire] department has five or more paid **members** [fire fighters], those five or more **paid members** [fire fighters] cannot serve as volunteers in the department for which they receive compensation. In other words, if a **member** [fire fighter] is a fully paid **member** [fire fighter], he/she cannot return to work in his/her time off as a volunteer in that department.

(B) Since Senate Bill 411 was **originally** designed specifically for fire fighters who serve without monetary remuneration effective July 1, 1989, those participants in the Senate Bill 411 retirement fund who **were** [are] serving as paid fire fighters in fire departments which **had** [have] five or more paid members, **could** [can] no longer participate in the Senate Bill 411 pension system. After this date, when a department **hired** [hires] its fifth paid member, all of the paid members **had to** [must] be dropped effective that date. It **was** [is] the responsibility the local board to notify this office when this **occurred** [occurs]. If the fire fighter **was** [is] vested in the Senate Bill 411 system, he/she **would** [will] receive the retirement due him/her upon application at age 55.

(i) **These provisions of FLSA still apply to volunteer members of the pension system.**

(ii) **If there are over four fully paid, non-auxiliary members in a department, the fully paid members cannot participate in Senate Bill 411 as volunteers for that department.**

(iii) **See §301.2(d) of this title (relating to Scope) for the crediting of service for members affected by the changes in the law.**

(4) Start of Membership.

(A) During a probationary period of service before becoming a regular member of a **member** [fire] department, if the governing body of the [fire] department is not making contributions for the probationary service, then that **person** [fire fighter] is not eligible for benefits under this Act.

(B) A department may have a probationary period of up to six months during which dues are not paid for the **member** [fire fighter]. Dues will be charged based on the date entered pension system as listed on the Personnel Form 502, as long as it is not more than six months from date entered **member** [fire] department.

(C) Personnel Form 502 must be submitted for new **members** [fire fighters] at the end of the probationary period. Failure to do so could mean denial of benefits.

(D) If there is a probationary period, it should be the same length of time for everyone in the department.

(E) If the date entered pension system is more than six months from date entered [fire] department, the commission will change date entered pension system on the Form 502 to within six months of date entered [fire] department and send a corrected copy to the department. Dues will be charged from the date established by the commission.

(5) Credit.

(A) Under TLFFRA law until [Until] September 1, 1993, prior to a department's entrance in Senate Bill 411, any fire fighter who was terminated from the department for one or more years **lost** [loses] any service earned before that period unless the local board **ruled** [rules] that the interruption in service was through no fault of the fire fighter.

(B) The department is not charged for non-qualifying years on the cost study. Effective September 1, 1989, buy-back years had to comply with minimum drill and fire requirements to qualify.

(C) Once a member of this retirement fund, the **member** [fire fighter] is not penalized for nonconsecutive periods of service.

(6) Dual Benefits.

(A) Death and Retirement.

(i) A member who performs qualified service for more than one [fire] department under this Act may become eligible to receive service retirement benefits for service for each department, but, if the person dies while a member, **of both departments** the member's beneficiary must choose between an on-duty and off-duty benefit **if applicable**.

(ii) In order to be eligible for retirement benefits from two or more different departments, the **members** [fire fighter's] service in the other departments must start before retirement from the primary department and he/she must start as a new member (without transferring time from the other department). See §2A, Membership, paragraphs (b)(4) and (c) in the pension fund law book.

(B) Disability and Retirement. A member [fire fighter] must, at the time of disability, elect between retirement or disability benefits if eligible for both. When a member, while on disability, reaches the age of 55 the member may switch to retirement benefits if he/she so chooses. The member shall then be deemed permanently retired.

§301.3. Determination of Costs [and/or Benefits].

(a) Prior Service.

(1)-(5) (No change.)

(6) Departments do not have to purchase prior service for those **members** [fire fighters] who reenter the department, but were not active at the time the fire department entered the pension system. If the department decides to purchase prior service on **members** [fire fighters] who were not active at the time the department entered the system, the department must pay the additional service in a lump sum payment. Interest is charged back to the date of the department's entrance into the system **if it has been over three years since the department's entrance in the system**. The rate is set by the board based on recommendations of the actuary.

(7) (No change.)

(b) Increase/Decrease of Dues Paid.

(1) Since a governing entity has the right to increase the dues it pays on its **members** [fire fighters], it also has the right to lower dues paid as long as it is not below the minimum set by law. In either case retirements are figured on the average paid. **Changes must be for at least $1 and they must be effective the first day of any month.**

(2) Departments which need to purchase dues for a member and those dues (contributions) cover a period of three or more years will have interest based on actuarial assumptions added to the amount owed. The payment must be made in a lump-sum amount. If the amount owed is off-set by a credit to the department from the termination of active members, the interest may be waived by the commissioner.

(c) (No change.)

(d) Retirement.

(1) A **member** [fire fighter] is considered to be retired on the effective date indicated on the Certificate of Retirement when the form is signed by the fire fighter and notarized. The fire fighter cannot revoke the pension and return to active duty.

(2) Effective September 1, 1997, deposit or cashing of the first pension check indicates that the payee agrees with the retirement amount granted. All first checks to payees are accompanied by notification of this rule.

(3) [(2)] A member who is not vested in this pension fund, but who has a total of 20 or more good years, may retire under the TLFFRA fund amount used in the cost study for that department. Since the member was on the cost study, he/she will be carried as a Senate Bill 411 fund retiree; and the public agency will not be charged as it is for TLFFRA fund retirees. [This applies mainly to public agencies that purchase accrued time only. Example: A member has time. If the member serves one more year, he/she at age 55, draws $25 per month in retirement benefits].

(4) [(3)] Retirement benefits vest as outlined in §6, Vesting of Benefits, of the pension fund law. A **member** [fire fighter] must have 15 years (180 months) in Senate Bill 411 before the Senate Bill 411 portion of the monthly retirement is affected by the 7.0% compounding factor (effective December 11, 1992).

(5) [(4)] A **member** [fire fighter] who was considered to be Active-Retired prior to September 1, 1989, may continue in that status. Should he/she terminate as an active **member** [fire fighter], the retiree cannot return to the Active-Retired status at a later date.

(6) [(5)] Spouses of terminated-vested **former members** [fire fighters], who die before age 55, are eligible to receive, on the effective date of the **member's** [fire fighters'] 55th birthday, a monthly pension that is two-thirds of the monthly pension which would have been due the **former member** [fire fighter] **(Became a part of the pension fund law September 1, 1997**.

(7) [(6)] The Fire Fighters' Pension Commission cannot pay benefits at a greater rate than specified in §3, Retirement Benefits, paragraph (b) of the pension fund law.

(8) [(7)] Effective January 1, 1984, the retirement annuity was increased from three times the average monthly contribution to six times. Effective September 1, 1991, all retirements figured at three times the average contribution were increased to 4.5 times. **Effective September 1, 1997, a COLA was granted Senate Bill 411 payees using a percentage based on their retirement date. The COLA applied to the buy-back and future service portion of their pensions only.**

(9) [(8)] In departments where the contribution rate has changed, the average is figured by rounding to the nearest month.

(10) [(9)] Retirement forms can be backdated to the **member's** [fire fighter's] 55 birthday or termination date depending on which is the latest. **The first check will be prorated back to the effective date of retirement, disability, etc.**

(11) All payees whose pensions are not effective the first day of the month will have their first checks prorated.

(12) [(10)] In the event of a pensioner's death (and there are no beneficiaries), if this office is not notified and retirement checks continue to be mailed, and the over-payment is not returned to this office, then the commissioner shall charge the over-payment to the governing entity.

(13) The commission does not withhold IRS taxes from pension checks. A letter and post card are mailed with the first pension check to every payee giving them this information. The payee must sign and return the post card to the commission office. This card states that the payee requests that no tax be withheld.

(14) Pension checks for the month are due at the end of the month. Checks are mailed from the commission office between the 24th and 28th of every month except December when they are mailed to arrive at the payee's residence or bank before Christmas.

(15) The commission at this time does not have direct deposit for payee pensions. The commission office can mail pension checks to the payee's bank. The payee should contact this office if interested in this service.

(e) Death.

(1) (No change.)

(2) Monthly Pension if Decedent Was on Active Status (On-Duty Death). For public agencies changing the amount of the monthly contributions after merging into the Senate Bill 411 fund, the surviving spouse's and dependent's monthly pensions, if the member died on-duty, will be based on two-thirds of the retirement due the **member** [fire fighter]. The **member** [fire fighter] is automatically vested with at least 15 years in the fund for on-duty deaths. The retirement is based on the average of the dues paid.

(3) Monthly Pension if Decedent Was on Active Status (Off-Duty Death). Dependents are not eligible for a monthly pension for off-duty deaths. Spouses will receive a monthly pension if the **member** [fire fighter] was vested in the system and at least 55 years of age. The monthly pension will be based on two-thirds of the retirement due the **member** [fire fighter] based on six times the average dues paid **for qualified service** (effective September 1, 1989).

(4) Benefits if Decedent Was on Inactive Status. Spouses of terminated-vested **members** [fire fighters], who die before age 55, are eligible to receive, on the effective date of the **member's** [fire fighter's] 55th birthday, a monthly pension that is two-thirds of the monthly pension which would have been due the **member** [fire fighter].

(5) Monthly Pension if Decedent Was on Disability Status. The statute, under §5(d), Death Benefits, states that if a **member** [fire fighter] dies after retirement, the surviving spouse shall receive two-thirds of the monthly pension the decedent was receiving at the time of death. This includes spouses of deceased **members** [fire fighters] who were on disability at the time of their death.

(6)-(8) (No change.)

(9) Determination of Beneficiaries.

(A) If a member on active status in the pension system should die before his/her 502 (Personnel Form) is filled out and notarized, the member's public agency's governing body should submit to the Fire Fighters' Pension Commission office, a notarized letter signed by its **chief or department head,** [fire chief] and local board. This letter should state the decedent's entrance date and that he/she was a member on active status at the time of death. The letter should also list the member's nearest relatives (spouse, children, parents, siblings, etc.) and if he/she had a will. The State Attorney General's office will determine the beneficiaries in such a case.

(B) After determination, the **local pension board** [governing body of the member's public agency] should send the Commission the Senate Bill 411 Survivor's Form and a death certificate. The letter would be considered as proof of the member's participation in the pension system. The commission would bill the public agency for any contributions owed on the member's time at the next billing.

(C) (No change.)

(10) Listing of Beneficiaries on Forms.

(A) Under Senate Bill 411, a **member** [fire fighter] can list anyone (including his/her estate) as a beneficiary for his/her lump-sum death benefit.

(B) A person may list as many people as he/she wants as beneficiaries of this lump-sum benefit, but the benefit will be divided equally between them unless the **member** [fire fighter] designates a proportional division.

(C) (No change.)

(11)-(13) (No change.)

§301.4. Revocation and Reduction of Benefits.

(a) A **payee** [retired fire fighter] may reduce or revoke benefits. This decision is binding on the spouse.

(b) This decision is irrevocable.

(c) Subsequent COLAs granted by the legislature or pension increases granted by governing bodies for TLFFRA payees will not be applied to those payees who have revoked or reduced their benefits.

§301.5. Billings and Annual Reports.

(a) Billings.

(1) The law states that each governing body shall contribute the funds for the **department's** [fire department] participation in the system.

(2) Although the department and governing body may have an agreement between themselves that the [fire] department will pay for participation in the system, if the department is unable to pay, the governing body is held liable for the payment.

(3) (No change.)

(4) The system cannot accept new **payees** [retirees] or pay lump-sum death benefits to departments whose governing body is not current on their bills to the pension system.

(5) The commissioner may elect to withhold pension payments to payees of departments which do not pay their bills in a timely manner. This measure will be used as a last resort for departments which have ignored repeated requests for payment. Payees will be notified by letter on the first day of the month in which payment of pensions is to be withheld.

(6) [(5)] Billings cannot be altered by the department or governing body without prior approval by the commission.

(b) Annual Reports.

(1)-(4) (No change.)

(5) The commission cannot accept new **payees** [pensioners, new disabilities] or pay lump-sum benefits to departments whose annual reports are not up to date. Also, pensioners of [fire] departments which do not have their annual reports submitted by March 31 (a two-month grace period) will, effective April 1, not receive their warrants until the report is received and accepted by this agency. All pensioners of the non-reporting departments will be notified by letter on April **1**explaining why the checks are being held.

§301.9. General.

(a) (No change.)

(b) Senate Bill 411 states that any benefits being paid by the current pension system (TLFFRA) at the date of merger will be paid by the Senate Bill 411 pension system following the merger. A governing entity may decide to pay its TLFFRA retirees and spouses an amount over the minimum set by TLFFRA. We will bill the **governing body** [city] this exact cost.

(c)-(d) (No change.)

(e) Effective January 1, 1994, Death Certificates are required for TLFFRA **payees** [retirees] **as well as Senate Bill 411 payees** before benefits can be paid to spouses.

(f) The [fire] department and/or governing entity should keep copies of all forms (502, 503, retirement, disability, survivors) on file. The originals must be on file in this office.

(g) Social Security Benefits. Regarding volunteer fire fighters who serve without monetary remuneration. Because the pension payment is not based on remuneration for services rendered, the pension payment is NOT subject to the Windfall Elimination Provision and as a result the pension will have NO effect on the person's social security benefit.

§301.10. Other Law Changes.

(a) (No change.)

(b) The Texas Statewide Volunteer Fire Fighters' Retirement Act was passed in 1977 and the title of the fund was changed to the Texas Statewide Volunteer Fire Fighters' Retirement Fund, September 1, 1989. **The title was changed to the Texas Statewide Emergency Services Act, effective September 1, 1997.**

(c) (No change.)

§301.11. Qualified Domestic Relations Order.

A domestic relations order, in substantially the same form as the model "Qualified Domestic Relations Orders", is pre-approved under the rules of the Fund as a qualified order if appropriately completed. The use of this model order is NOT mandatory; however, an order in other than the pre-approved form must be reviewed by the Fund's Legal Counsel for a determination as to its qualification.

(1) Rules and Regulations of the Texas Statewide Emergency Services Personnel Act: C.6. Form of Qualified Domestic Relations Order.

(A) The Qualified Domestic Relations Order Form, which is adopted by reference in this section, has been pre-approved by the retirement fund as meeting the requirements of this chapter for a qualified order. A qualified domestic relations order, in substantially the model form which is adopted by reference in this section, incorporates by reference the definitions set forth in paragraph (2) of this subsection.

(B) It is the responsibility of the parties to insert the correct information in the pre-approved form at those places marked by parenthesis enclosing capital letters, and to provide the system with a certified copy of the order after it has been entered.

(C) The term "community property ratio" as used in the pre-approved form shall mean the ratio that Participant's credited service between the dates shown bears to Participant's total qualified service at the time of retirement or withdrawal of accumulated contributions.

(D) The fraction inserted in paragraph (4) of the pre-approved form customarily would be one-half; however, nothing in this section shall preclude the parties inserting any fraction that is intended to control the division of the benefit.

(E) The dates inserted in paragraph (4) of the pre-approved form customarily would be the dates the marriage began and ended; however, nothing in this section shall preclude the parties inserting any dates that are intended to control the division of the benefit.

(2) Provisions Incorporated by Reference. An order on the form set forth in paragraph (1) of this section expressly incorporates all of the following subparagraphs (A)-(O) by reference.

(A) The order shall not be interpreted in any way to require the Fund to provide any type or form of benefit or any option not otherwise provided under the Fund.

(B) The order shall not be interpreted in any way to require the Fund to provide increased benefits determined on the basis of actuarial value.

(C) The order shall not be interpreted in any way to require the Fund to pay any benefits to an/any Alternate Payee named in the order which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(D) The order shall not be interpreted in any way to require the payment of benefits to Alternate Payee before the retirement of Participant, the distribution of a withdrawal of contributions to Participant as authorized by the statutes governing the fund, or other distribution to Participant required by law.

(E) If the Fund provides for a reduced benefit upon "early retirement", the order shall be interpreted to require that, in the event of Participant's retirement before normal retirement age, the benefits payable to Alternate Payee shall be reduced in a proportionate amount.

(F) The order shall not be interpreted to require the designation of a particular person as the recipient of benefits in the event of Participant's death, or to require the selection of a particular benefit plan or option.

(G) In the event that, after the date of the order, the amount of any benefit otherwise payable to Participant is increased as a result of amendments to the law governing the Fund, Alternate Payees shall receive a proportionate part of such increase unless such an order would disqualify the order under the rules the Fund has adopted with regard to qualified domestic relations orders.

(H) In the event that, after the date of the order, the amount of any benefit otherwise payable to Participant is reduced by law, the portion of benefits payable to Alternate Payee shall be reduced in a proportionate amount.

(I) If as a result of Participant's death after the date of the order, a payment is made by the Fund to Participant's estate, surviving spouse, or designated beneficiaries, which payment does not relate in any way to Participant's length of employment or accumulated contributions with the Fund, but rather is purely a death benefit payable as a result of employment or retired status at the time of death, no portion of such payment is community property, and Alternate Payee shall have no interest in such death benefit.

(J) If the board of trustees of the Fund had by rule provided that, in lieu of paying an alternate payee the interest awarded by a qualified domestic relations order, the Fund may pay the alternate payee an amount that is the actuarial equivalent of: an annuity payable in equal monthly installments for the life of the alternate payee, or a lump sum, then and in that event the Fund is authorized to make such a payment under the order.

(K) All payments to Alternate Payee under the order shall terminate upon Alternate Payee's death or at such earlier date as may be required as a result of the retirement option selected by Participant.

(L) All benefits payable under the Fund, other than those payable under paragraph (4) of the order to Alternate Payee, shall be payable to Participant in such manner and form as Participant may elect in his/her sole and undivided discretion, subject only to Fund requirements.

(M) Alternate Payee is ORDERED to report any retirement payments received on any applicable income tax return, and to promptly notify the Fund of any changes in Alternate Payee's mailing address. The Fund is authorized to issue a form 1099R on any direct payment made to Alternate Payee.

(N) Participant is designated a constructive trustee for receiving any retirement benefits under the Fund that are due to Alternate Payee but paid to Participant. Participant is ORDERED to pay the benefit defined in this paragraph directly to Alternate Payee within three days after the receipt by Participant. All payments made directly to Alternate Payee by the Fund shall be a credit against this order.

(O) The Court retains jurisdiction to amend the order so that it will constitute a qualified domestic relations order under

the Fund even though all other matters incident to this action or proceeding have been fully and finally adjudicated.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711297
Elaine Rummel
Program Administrator
Fire Fighter's Pension Commission
Earliest possible date of adoption: October 6, 1997
For further information, please call: (512) 936-3476

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 3. Income Assistance Services

The Texas Department of Human Services (DHS) proposes to amend §3.301, concerning responsibilities of clients and DHS, and new subchapter TT, containing §§3.7301-3.7303, concerning career opportunity orientation requirements, to its Income Assistance Services rule chapter. The purpose of the amendment and new sections is to implement the career opportunity orientation requirement of the Job Opportunities and Basic Skills (JOBS) program administered by the Texas Workforce Commission.

Eric M. Bost, commissioner, has determined that for the first five-year period the proposed sections will be in effect there will be fiscal implications for state government as a result of enforcing or administering the sections. The effect on state government for the first five-year period the sections will be in effect is an estimated additional cost of $695,561 in fiscal year (FY) 1998; $927,414 in FY 1999; $927,414 in FY 2000; $927,414 in FY 2001; and $927,414 in FY 2002. There will be no fiscal implications for local government as a result of enforcing or administering the sections.

Mr. Bost also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be that it will help clients to understand Aid to Families with Dependent Children (AFDC) benefits are time-limited and the importance of work and personal responsibility. It will introduce AFDC applicants to the available resources of the Texas Workforce Commission and prepare the individual for independence before expiration of their state and federal time limits. Individuals who find employment as a result of the orientation will also help to decrease the state's unemployment level. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of this proposal may be directed to Kevin Brown at (512) 438-3084 in DHS's Client Self-Support Services Department. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-309, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Subchapter C. The Application Process

40 TAC §3.301

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public and financial assistance programs.

The amendment implements the Human Resources Code, §§22.001-22.030 and §§31.001-31.0325.

§3.301. Responsibilities of Clients and the Texas Department of Human Services (DHS).

(a) To apply, the client must complete the application process. Client must:

(1)-(6) (No change).

(7) comply with the requirement to attend a career opportunity orientation unless the individual meets the exception criteria as specified in §3.7302 of this title (relating to Exceptions to the Career Opportunity Orientation Requirements).

(b)-(d) (No change).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711348
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Proposed date of adoption: December 1, 1997
For further information, please call: (512) 438–3765

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Subchapter TT. Career Opportunity Orientation

40 TAC §§3.7301–3.7303

The new sections are proposed under the Human Resources Code, Title 2, Chapters 22 and 31, which provides the department with the authority to administer public and financial assistance programs.

The new sections implement the Human Resources Code, §§22.001-22.030 and §§31.001-31.0325.

§3.7301. Career Opportunity Orientation Requirements.

Aid to Families with Dependent Children (AFDC). AFDC adults and minor parents, age 16 through 59, living in a Job Opportunities and Basic Skills (JOBS) county, with AFDC children, must comply with the requirement to attend a Career Opportunity Orientation presented by the Texas Workforce Commission.

§3.7302. Exceptions to the Career Opportunity Orientation Requirements.

Aid to Families with Dependent Children (AFDC). An individual applying for or receiving AFDC is not required to attend a Career

Opportunity Orientation presented by the Texas Workforce Commission if the individual:

(1) is too remote from the orientation site or there is no public transportation;

(2) is incapacitated;

(3) is a child age 16, 17, or 18, and enrolled in school;

(4) is age 60 or older;

(5) is needed in the home to care for an incapacitated child or adult;

(6) is caring for a child under four months of age;

(7) is employed and working 30 hours or more a week at minimum wage or earning the equivalent of 30 hours a week at minimum wage; or

(8) has an open Job Opportunities and Basic Skills (JOBS) case.

§3.7303. Failure to Comply.

If a caretaker or second parent who is required to attend a Career Opportunity Orientation as specified in §3.7301(a) of this title (relating to Career Opportunity Orientation Requirements) refuses or fails to comply, then the application or case will be denied. If a client age 16, 17, or 18, certified as a child, and required to attend the Career Opportunity Orientation refuses of fails to comply, then the child will be disqualified from Aid to Families with Dependent Children (AFDC).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711347
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Proposed date of adoption: December 1, 1997
For further information, please call: (512) 438–3765

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WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 7. BANKING AND SECURITIES

Part II. Texas Department of Banking

Chapter 15. Corporate Activities

Subchapter A. Fees and Other Provisions of General Applicability

7 TAC §15.3

The Texas Department of Banking has withdrawn from consideration for permanent adoption the proposed amendment to §15.3, which appeared in the July 8, 1997, issue of the *Texas Register* (22 TexReg 6384).

Issued in Austin, Texas, on August 22, 1997.

TRD-9711171
Everette D. Jobe
General Counsel
Texas Department of Banking
Effective date: August 25, 1997
For further information, please call: (512) 475–1300

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 12. Independent Review Organizations

Subchapter A. General Provisions

28 TAC §§12.1–12.5

The Texas Department of Insurance has withdrawn from consideration for permanent adoption the proposed new §§12.1–12.5, which appeared in the July 25, 1997, issue of the *Texas Register* (22 TexReg 6914).

Issued in Austin, Texas, on August 27, 1997.

TRD-9711339
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: August 27, 1997
For further information, please call: (512) 463-6327

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Subchapter B. Certification of Independent Review Organizations

28 TAC §§12.101–12.109

The Texas Department of Insurance has withdrawn from consideration for permanent adoption the proposed new §§12.101–12.109, which appeared in the July 25, 1997, issue of the *Texas Register* (22 TexReg 6917).

Issued in Austin, Texas, on August 27, 1997.

TRD-9711343
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: August 27, 1997
For further information, please call: (512) 463-6327

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Subchapter C. General Standards of Independent Review

28 TAC §§12.201–12.208

The Texas Department of Insurance has withdrawn from consideration for permanent adoption the proposed new §§12.201–12.208, which appeared in the July 25, 1997, issue of the *Texas Register* (22 TexReg 6920).

Issued in Austin, Texas, on August 27, 1997.

TRD-9711342
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: August 27, 1997
For further information, please call: (512) 463-6327

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Subchapter D. Enforcement of Independent Review Standards

28 TAC §§12.301–12.303

The Texas Department of Insurance has withdrawn from consideration for permanent adoption the proposed new §§12.301–

12.303, which appeared in the July 25, 1997, issue of the *Texas Register* (22 TexReg 6922).

Issued in Austin, Texas, on August 27, 1997.

TRD-9711344
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: August 27, 1997
For further information, please call: (512) 463-6327

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Subchapter E. Fees and Payment

28 TAC §§12.401–12.406

The Texas Department of Insurance has withdrawn from consideration for permanent adoption the proposed new §§12.401–12.406, which appeared in the July 25, 1997, issue of the *Texas Register* (22 TexReg 6923).

Issued in Austin, Texas, on August 27, 1997.

TRD-9711345
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: August 27, 1997
For further information, please call: (512) 463-6327

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Subchapter F. Random Assignment of Independent Review Organizations

28 TAC §12.501, §12.502

The Texas Department of Insurance has withdrawn from consideration for permanent adoption the proposed new §12.501 and §12.502, which appeared in the July 25, 1997, issue of the *Texas Register* (22 TexReg 6924).

Issued in Austin, Texas, on August 27, 1997.

TRD-9711346
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: August 27, 1997
For further information, please call: (512) 463-6327

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part XX. Texas Workforce Commission

Chapter 800. General Administration

Subchapter B. Allocation and Funding

40 TAC §800.58

The Texas Workforce Commission has withdrawn from consideration for permanent adoption the proposed new §800.58, which appeared in the June 17, 1997, issue of the *Texas Register* (22 TexReg 5823).

Issued in Austin, Texas, on August 20, 1997.

TRD-9711029
J. Ferris Duhon
Acting Deputy Director of Legal Services
Texas Workforce Commission
Effective date: August 20, 1997
For further information, please call: (512) 463–8812

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ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

Part VII. State Office of Administrative Hearings

Chapter 159. Rules of Procedure for Administrative License Suspension Hearings

1 TAC §§159.3, 159.19, 159.37, 159.41

The State Office of Administrative Hearings (SOAH) adopts amendments to §§159.3, 159.19, 159.37, and 159.41, concerning Administrative License Suspension Hearings, commonly known as the Administrative License Revocation (ALR) Program. Sections 159.3, 159.19 and 159.37 are adopted with changes to the proposed text as published in the July 8, 1997 issue of the *Texas Register* (22 TexReg 6383). Section 159.41 concerning other Office Rules of Procedure is adopted without change and therefore will not be republished.

The amended rules are necessary to update statutory citations and to more closely conform language in the sections to language incorporated in the Texas Transportation Code and to set out the issues in ALR hearings involving minors, pursuant to Senate Bill 35 enacted during the 75th Legislative Session, 1997. Amendment of §159.37 is necessary to more fully reflect the offices' practice in processing ALR appeals. Amendment to §159.41 is necessary pursuant to Senate Bill 331 also enacted during the 75th Legislative Session, 1997, which amended Government Code §2003.042 by granting SOAH judges certain sanction authority. Amendment of §159.3 and §159.19 is also required in order to implement the new provisions enacted by the 75th Texas Legislature.

This adoption includes several changes to the proposed text as published, many of which were made in response to written comments.

In §159.3, the adopted section corrected a statutory citation in the definition found at (a)5, and clarified the definition of "conviction" found at (a)(12) in response to comments.

In §159.19(a)(1)(B)(iv), the adopted section restored the adjective, "proper," to modify the request of an officer who requests a breath or blood specimen from a driver arrested for driving while intoxicated; this was done in response to comments received and to maintain consistency with statutory and case law requirements relating to the warnings that must be given. A new subsection was also added to this section in response to comments to clarify that proof of age is not required in hearings involving adults.

In §159.37, the adopted section changed subsection (h) to clarify the procedures parties are to follow when a reviewing court issues a remand order in an ALR appeal. The office deemed this change necessary to inform parties of their specific responsibilities upon receipt of a remand order, so the office may be able to comply with its statutory obligations. The changes made from the original text also simplified money handling procedures for the office.

No public hearing was requested or held on the proposed amendments. Written comments were received by SOAH through August 7, 1997. Written comments were received from Lawrence G. Boyd, Attorney at Law in private practice and from Angela Parker, Director of Hearings (ALR) with the Texas Department of Public Safety. Following is a summary of the substantive comments and includes SOAH's responses.

COMMENTS RELATING TO §159.3: One commenter noted that defining a deferred adjudication as a "conviction" could be unfair because of flaws in the underlying plea bargain, etc., and that the second sentence in the definition of conviction could be interpreted to apply to adults also. SOAH declines to delete "deferred adjudications" from the definition of conviction as to minors because the legislature expressly included them in the definition. In response to the latter concern, SOAH added clarification in the second sentence to indicate the deferred adjudications to be considered convictions related to those received by minors only.

The same commenter also objected to the definition of peace officer. SOAH disagrees that the definition creates confusion. The definition was simply renumbered; there was no change from the text as originally adopted and SOAH has not encountered parties who were confused by the definition.

Another commenter pointed out an error in a subsection of the statutory citation in the definition of "Alcohol-related or drug-related enforcement contact." SOAH agrees, and made the correction.

The same commenter stated the definition of "Intoxicated" found at subsection 19 included superfluous language which would lead to confusion. The commenter misunderstood SOAH's intent which was to change the definition of intoxicated to "Has the meaning assigned by Texas Penal Code, §49.01(2)."

For that reason, SOAH made no change to the proposed amendment.

COMMENTS RELATING TO §159.19: One commenter noted that the deletion of "proper" as a modifying term from the phrase, "upon proper request of the officer" was inconsistent with established case law, *see Erdman v. State*, 861 S.W. 2d 890 (Tex. Crim. App. 1993, reh. den.), which requires an officer who requests a breath or blood specimen to give the driver very specific warnings and information. SOAH agrees with this comment and retained the modifier.

Another commenter noted that the inclusion of "and" in §159.19(a)(1)(A)(i) and in § 159.19(a)(1)(B)(i) was incorrect as the applicable Transportation Code sections provide the issues are whether "reasonable suspicion "or" probable cause to arrest the person existed and whether "reasonable suspicion "or" probable cause existed to stop "or" arrest the person," respectively. The commenter urged the same position as to the new subsections involving minors. SOAH disagrees with the commenter's position inasmuch as numerous cases have interpreted the cited provisions in some situations to require proof of both reasonable suspicion to stop "and" probable cause to arrest. *See Townsend v. State*, 813 S.W. 2d 181 (Tex. App.–Houston [14th Dist] 1991, pet. ref'd), *Johnson v. State*, 658 S.W. 2d 626 (Tex. Crim. App. 1983) and *Texas Dept. of Public Safety v. Rodriguez*, Number 03-96-00533-CV, (Tex. App.–Austin, [3rd Dist], 1997). SOAH therefore disagrees with the comment and will keep the text as published.

The same commenter pointed out that the heading in §159.19(a)(1) could be interpreted to mean that a driver's age had to be proved in ALR cases involving adults. We agree the heading could be read in this manner and have added a subsection to clarify that unless the department is proceeding against a minor under the provisions of Senate Bill 35, age is not an element requiring proof.

The commenter also argued that the 75th legislature had not changed the issues under § 724.042 and consequently SOAH should not change the issues that are required to authorize suspension of a minor's driver's license if the minor refused to provide a specimen of breath or blood. SOAH disagrees with this comment. While the legislature may not have changed the issues set out under §724.042, it did amend the Implied Consent Law, Chapter 724 of the Transportation Code to include within its coverage persons under 21 years of age who may be arrested for an offense under §106.041 of the Alcoholic Beverage Code, *see Transportation Code, §724.011 and §724.012, as amended*. The legislature also amended the statutory warning that must be given to minors and provided for a different suspension period than that for adults, *see §724.015 of the Transportation Code*. So, even though the legislature may not have explicitly changed the issues that apply in minor refusal cases, its action in changing the provisions of the Implied Consent Law necessarily requires the issues in minor refusal cases to be different. For that reason, SOAH incorporated specific sections of the Transportation Code, *supra* , and retains the issues under §159.19(a)(2)(B) as proposed.

COMMENTS RELATING TO §159.37: SOAH staff reconsidered the proposed amendment and made several minor changes to further clarify the procedures a party who obtains a remand hearing is to follow in order to have the office schedule a hearing on remand and to forward any additional evidence that is taken at that hearing to the remanding court.

The amendments are adopted under Transportation Code §524.002 and §724.003 which authorize SOAH to promulgate rules for the administration of Chapters 524 and 724 of the Transportation Code.

The following statutes are affected by the proposed amendments: Texas Transportation Code, Chapters 524 and 724; Texas Government Code §2001 and §2003; Penal Code, Chapter 49; Texas Alcoholic Beverage Code §106.041, and Texas Family Code, Title 3 § 51.02.

§159.3. Definitions.

(a) In this chapter, the following terms have the meaning indicated:

(1) "Administrative Law Judge" or "Judge" - An individual appointed by the Chief Administrative Law Judge of the State Office of Administrative Hearings under the Texas Government Code, Chapter 2003 and Texas Transportation Code, Chapters 524 and 724.

(2) "Adult" - An individual 21 years of age or older.

(3) "ALR Suspension" - Pursuant to Texas Transportation Code, Chapters 522, 524 or 724 means an administrative driver's license suspension under the Administrative License Revocation (ALR) Program which is the subject of this chapter.

(4) "Alcohol concentration" - As defined in Penal Code §49.01(1) means:

(A) the number of grams of alcohol per 100 milliliters of blood;

(B) the number of grams of alcohol per 210 liters of breath; or

(C) the number of grams of alcohol per 67 milliliters of urine.

(5) "Alcohol-related or drug-related enforcement contact" - As defined in Texas Transportation Code, §524.001(3) means a driver's license suspension, disqualification, or prohibition order under the laws of this state or another state following:

(A) a conviction of an offense prohibiting the operation of a motor vehicle while intoxicated, while under the influence of alcohol, or while under the influence of a controlled substance;

(B) a refusal to submit to the taking of a blood or breath specimen following an arrest for an offense prohibiting the operation of a motor vehicle while intoxicated, while under the influence of alcohol, or while under the influence of a controlled substance; or

(C) an analysis of a blood or breath specimen showing an alcohol concentration of the level specified in §49.01(2), of the Penal Code, following an arrest for an offense prohibiting the operation of a motor vehicle while intoxicated.

(6) "APA" - The Texas Administrative Procedure Act, Texas Government Code, Chapter 2001.

(7) "Certified Breath Test Technical Supervisor" - A person who has been certified by the department to maintain and

direct the operation of a breath test instrument used to analyze breath specimens of persons suspected of driving while intoxicated.

(8) "Child" - As defined in §51.02, of the Texas Family Code, means a person who is:

(A) 10 years of age or older and under 17 years of age; or

(B) 17 years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

(9) "Commercial Driver's License" - As defined in Texas **Transportation Code, § 522.003(3), means a license issued to an individual that authorizes the individual to drive a class of commercial motor vehicle.**

(10) "Commercial Motor Vehicle" - As defined in Texas Transportation Code, §522.003(5), means a motor vehicle or combination of motor vehicles used to transport passengers or property that:

(A) has a gross combination weight rating of 26,001 or more pounds including a towed unit with a gross vehicle weight rating of more than 10,000 pounds;

(B) has a gross vehicle weight rating of 26,001 or more pounds;

(C) is designed to transport sixteen or more passengers, including the driver; or

(D) is transporting hazardous materials and is required to be placarded under 49 C.F.R. Part 172, Subpart F.

(11) "Contested Case" - A proceeding brought under Texas Transportation Code, Chapter 522 Subchapter I, Chapter 524 Subchapter D, or Chapter 724 Subchapter D.

(12) "Conviction," - When involving minors, includes an adjudication under Title 3 of the Texas Family Code for conduct constituting an offense under §106.041, Alcoholic Beverage Code or under §§49.04, 49.07, 49.08, of the Penal Code. An order of deferred adjudication received by a minor for an offense alleged under the aforementioned sections is also considered a conviction.

(13) "Defendant" - One who holds a license as defined in paragraph (20) of this subsection and whose legal rights, duties, statutory entitlement, or privileges may be affected by the outcome of a contested case under this chapter.

(14) "Denial" - The non-issuance of a license or permit, and loss of the privilege to obtain a license or permit, as defined in paragraph 20 of this subsection.

(15) "Department" - The Department of Public Safety.

(16) "Disqualification" - As defined in Texas Transportation Code, §522.003(9), means a withdrawal of the privilege to drive a commercial motor vehicle and includes the suspension, cancellation, or revocation of that privilege as authorized by a state or federal law.

(17) "Driver" - A person who drives or is in actual physical control of a motor vehicle.

(18) "Final Decision" - The decision issued by a Judge who hears the contested case and who is authorized under Texas Transportation Code, Chapter 522, Subchapter I, Chapter 524, Subchapter D, or Chapter 724, Subchapter D to issue final decisions in driver's license suspension cases.

(19) "Intoxicated"- Has the meaning assigned by Penal Code, §49.01(2).

(20) "License" - A driver's license or other license or permit as provided in Texas Transportation Code §521.001(a)(6) to operate a motor vehicle issued under, or granted by, the laws of this state.

(21) "Minor" - An individual under 21 years of age.

(22) "Nonresident" - A person who is not a resident of this state.

(23) "Office" - The State Office of Administrative Hearings.

(24) "Operate" - To drive or be in actual physical control of a motor vehicle.

(25) "Peace Officer" - As used in Texas Transportation Code, Chapters 522, 524 and 724, means a person elected, employed, or appointed as a peace officer under Article 2.12, Code of Criminal Procedure, or other law. A peace officer may also be referred to as an arresting officer.

(26) "Public Place" - Any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

(27) "Test" - Pursuant to Texas Transportation Code, Chapter 724, Subchapter B, or Chapter 522, Subchapter I, means the following:

(A) one or more specimens of a person's breath for the purpose of analysis to determine the alcohol concentration; or

(B) one or more specimens of a person's blood for the purpose of analysis to determine the alcohol concentration or the presence in his body of a controlled substance, drug, dangerous drug or other substance; or

(C) one or more specimens of a person's urine for the purpose of analysis to determine the alcohol concentration or the presence in his body of a controlled substance, drug, dangerous drug or other substance.

(b) (No change.)

§159.19. Issues.

(a) The Judge, in determining the merits of the case, shall consider whether the department proved the elements of the following issues by a preponderance of the evidence:

(1) Hearings Involving Adults

(A) If the hearing is under Texas Transportation Code, Chapter 524, Subchapter D, (test failed):

(i) whether reasonable suspicion to stop and/or probable cause to arrest the person existed; and

(ii) whether the person had an alcohol concentration of a level specified in Penal Code § 49.01(2), while operating a motor vehicle in a public place.

(B) If the hearing is under Texas Transportation Code, Chapter 724, Subchapter D, (test refused):

(i) whether reasonable suspicion to stop and/or probable cause to arrest the person existed; and

(ii) whether probable cause existed to believe that the person was operating a motor vehicle in a public place while intoxicated; and

(iii) whether the person was placed under arrest by the officer and was requested to submit to the taking of a specimen under Texas Transportation Code Chapter 724; and

(iv) whether the person refused to submit to the taking of a specimen on proper request of the officer.

(2) Hearings Involving Minors

(A) If the hearing is under Texas Transportation Code, Chapter 524, Subchapter D, § 524.035, as amended, (test failed):

(i) whether the person is a minor, and

(ii) whether reasonable suspicion to stop and/or probable cause to arrest or take the minor into custody existed, and

(iii) whether the minor had any detectable amount of alcohol in the minor's system while operating a motor vehicle in a public place.

(B) If the hearing is under Texas Transportation Code, Chapter 724, Subchapter D, as amended, (test refused):

(i) whether reasonable suspicion to stop and/or probable cause to arrest or take the minor into custody existed; and

(ii) whether probable cause existed to believe that the minor was operating a motor vehicle in a public place while intoxicated, or while having any detectable amount of alcohol in the minor's system; and

(iii) whether the minor was placed under arrest or taken into custody and was requested to submit to the taking of a specimen under Texas Transportation Code Sections 724.011, 724.012 and 724.015, as amended; and

(iv) whether the minor refused to submit to the taking of a specimen on proper request of the officer.

(b) Nothing in subsection (a)(1) of this section shall be interpreted to require proof of a person's age.

(c) If the Judge finds the department proved each of the required elements by a preponderance of the evidence, the Judge will grant the department's petition and authorize the department to suspend or deny the license. If the Judge does not find that the department proved all of the necessary elements, the Judge will deny the petition, and the department shall not be authorized to suspend or deny the defendant's license.

§159.37. Appeal of Judge's Decision.

(a) Pursuant to Texas Transportation Code, §§522.105 (d), 524.041 et seq., or 724.047, a person whose driver's license has been suspended after a hearing under this section may appeal the suspension by filing, within thirty days after the date the Judge's final determination is issued, a petition in a county court at law in the county where the person was arrested or, if there is no county court at law in the county, in the county court of the county. Review shall be based on the substantial evidence rule as set forth in Government Code, Chapter 2001, §2001.174.

(b)-(c) (No change.)

(d) A person who appeals shall send by certified mail a copy of the person's petition, certified by the clerk of the court in which the petition is filed, to the Office at its main office in Austin, and to the opposing party at its address of record.

(e) On appeal, review is on the record as certified by the Office with no additional testimony, except after remand as provided by subsection (h) of this section. The record shall consist of the following:

(1) the first file-marked or stamped copy of all parties' motions or other pleadings;

(2) all written orders or decisions issued by the Judge and any evidence of transmittal to the parties;

(3) all exhibits admitted into evidence;

(4) all exhibits not admitted into evidence, but made a part of the record by a party as an offer of proof or bill of exceptions;

(5) a transcription of the proceedings electronically recorded by the Office.

(f) A person who appeals a suspension may obtain a transcript of the administrative hearing by sending a written request to the Office within ten days of filing the appeal and paying the applicable fees. The fees shall not exceed the actual cost of preparing or copying the transcript, and upon payment thereof, the Office shall promptly furnish the reviewing court and both parties a certified copy of the record. The transcription of the electronic recording made by the Office constitutes the official record for appellate purposes, provided however, that the original recording of proceedings shall be maintained by the Office, and a copy of this recording shall be available for review by the parties or a reviewing court if necessary.

(g) (No change.)

(h) On appeal, any party may apply to the court for leave to present additional evidence, and the court, if satisfied that additional information is material and that there were good reasons for the failure to present it in the hearing before a Judge, may remand the case with instructions that the additional evidence be taken before a Judge on conditions determined by the court.

(1) If a case is remanded for taking of additional evidence, the appellant must file with the office, within ten days of the signing of the reviewing court's remand order, a request for relief, including the setting of a hearing on remand;

(2) The request must include a copy of the remand order and an estimate of the time required to present the additional evidence, if a hearing is requested.

(3) If a remand hearing is held and testimony is given and/or exhibits are introduced, the office will file a certified copy of the record of the hearing with the reviewing court. A transcription of the remand hearing will be filed with the reviewing court, provided the party who sought the remand hearing pays the fees, as determined by the office, required to prepare the transcript and/or exhibits.

(i)-(j) (No change.)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711296
Phillip A. Holder
Deputy Chief Administrative Law Judge
State Office of Administrative Hearings
Effective date: September 15, 1997
Proposal publication date: July 8, 1997
For further information, please call: (512) 475-4993

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TITLE 4. AGRICULTURE

Part I. Texas Department of Agriculture

Chapter 1. General Procedures

Subchapter H. Requests for Public Information

4 TAC §1.401

The Texas Department of Agriculture adopts an amendment to §1.401, concerning requests for public information, without changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6510). The amendment is adopted to make the section consistent with changes made to the Open Records Act, the Government Code, Chapter 552 by House Bill 951, 75th Legislature, 1997. The amendment changes the time for producing public information for inspection or duplication from ten calendar to ten business days.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Agriculture Code, §12.016, which provides the Texas Department of Agriculture with the authority to adopt rules to administer the Code; and, the Texas Government Code, §2001.004, which provides the department with the authority to adopt rules of procedure, and the Government Code, §552.230 which provides the department with the authority to adopt rules of procedure for inspection of public information.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711275
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 463–7541

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Chapter 18. Organic Standards and Certification

4 TAC §18.2

The Texas Department of Agriculture (the department), adopts the amendment to §18.2, concerning organic certification period. Section 18.2 is adopted without changes to the proposed text as published in the July 15, 1997 issue of the *Texas Register* (22 TexReg 6511) and will not be republished.

The amendment is adopted to change the current certification period from a fiscal year to a calendar year. The amendment will make the rule consistent with changes made to the Texas Agriculture Code, Chapter 18 as amended by HB 372 during the 75th Legislative Session, 1997, and will allow applicants to complete new and/or renewal applications during a more appropriate time of the growing season.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Texas Agricultural Code, §18.002, which provides the Texas Department of Agriculture with the authority to adopt rules as necessary for administration of the Code, Chapter 18.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 21, 1997.

TRD-9711081
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 10, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 463–7541

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Chapter 23. Rose Grading

4 TAC §23.2, §23.3

The Texas Department of Agriculture (the department) adopts amendments to §23.2, concerning application for a certificate of authority, and §23.3, concerning fees without changes to the proposed texas as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6512). The amendments are adopted to make the rule consistent with changes made to the Texas Agriculture Code, Chapter 121 as amended by House Bill 372 during the 75th Legislative Session, 1997. The amendment will require obtaining a certificate of authority from the department only for those who grade or influence the grade of rose plants and not for those who sell rose plants.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the Texas Agriculture Code, Chapter 121, which provides the Texas Department of Agriculture with the authority to adopt rules and prescribe procedures for the inspection, grading, and labeling of all rose plants sold or offered for sale within this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711276
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 463–7541

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TITLE 7. BANKING AND SECURITIES

Part II. Texas Department of Banking

Chapter 15. Corporate Activities

Subchapter A. Fees and Other Provisions of General Applicability

7 TAC §15.1

The Finance Commission (the commission) adopts an amendment to §15.1, concerning definitions relating to provisions of general applicability, with nonsubstantive changes to the text as proposed in the July 8, 1997, issue of the *Texas Register* (22 TexReg 6384).

The recision of the banking commissioner's capital maintenance policy resulted in the need for this amendment to provide uniformity with federal law.

Pursuant to this amendment, an "eligible bank" must be "well capitalized" as defined in 12 Code of Federal Regulations, §325.103, and the definition of "well capitalized" will comport with criteria established for national banks. (An "eligible bank " qualifies for expedited treatment of certain applications.) The amendment will provide consistency in state and federal regulations regarding the definition of "well capitalized" and its effect on banks.

Because the Texas Banking Act is being repealed in connection with its codification into the Finance Code, by Act of May 24, 1997, House Bill 10, §1, 75th Legislature, effective September 1, 1997, the citations to statutes in the introductory paragraph of this section as well as within the definitions of "accepted filing," "public notice," and "submitted filing" have been modified to correctly cite to the Finance Code. No amendments were proposed for these provisions.

The agency received no comments on the proposal.

The section is adopted pursuant to the Act, §1.012(a), which provides that the commission may adopt rules "to accomplish the purposes of this Act," including rules that "implement and clarify" the Act.

As required by the Act, §1.012(b), the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

§15.1. Definitions.
Words and terms used in this chapter that are defined in the Finance Code, Title 3, Subtitle A, have the same meanings as defined in the Finance Code. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

Accepted filing–Includes any application, request, notice, or protest filed under the Finance Code, Title 3, Subtitle A, this chapter, or any rule or regulation adopted pursuant to the Finance Code, in which the banking commissioner has received sufficient information to reach an informed decision, the appropriate fee has been paid pursuant to §15.2 of this title (relating to Filing Fees and Cost Deposits), and the banking commissioner has notified the person or entity who submitted the filing, in writing, that the submission is complete and has been accepted for filing.

Eligible bank–A state bank that:

(A) is well capitalized as defined in 12 Code of Federal Regulations, §325.103, or is operating in compliance with a capital plan approved in writing by the banking commissioner;

(B)-(E) (No change)

Public notice–Any matter including an application, request, notice, or protest, whether by proclamation or declaration, required or authorized to be published in a newspaper of general circulation by the Finance Code, Title 3, Subtitle A, this chapter, or any rule or regulation adopted pursuant to the Finance Code, or required to be published by the banking commissioner.

Submitted filing–Includes any initial application, request, notice, or protest filed under the Finance Code, Title 3, Subtitle A, this chapter or any rule or regulation adopted pursuant to the Finance Code, that is neither an accepted filing nor been abandoned.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711163
Everette D. Jobe
General Counsel
Texas Department of Banking
Effective date: September 15, 1997
Proposal publication date: July 8, 1997
For further information, please call: (512) 475–1300

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Subchapter F. Applications for Merger, Conversion, and Purchase or Sale of Assets

7 TAC §§15.101-15.117

The Finance Commission of Texas (the commission) adopts new §§15.101-15.117, concerning applications for merger, conversion, share exchange, and purchase or sale of assets by or involving state banks and bank holding companies subject to

regulation by the Banking Commissioner of Texas (the commissioner), with non-substantive changes to the text as proposed in the July 8, 1997, issue of the *Texas Register* (22 TexReg 6385).

The adopted sections comprise new Subchapter F entitled Applications for Merger, Conversion, and Purchase or Sale of Assets. The sections set out when an application is necessary and the information that must be included in the application, set publications standards, establish parameters for required opinions of counsel, define confidentiality provisions, and clarify the role of the commissioner in the approval process. The new subchapter is necessary because of the enactment of the now repealed and re-codified Texas Civil Statutes, Articles 342-1.001 et seq. In addition, new §§15.101 to 15.117 are adopted to reduce regulatory burden and to make Texas law compatible with federal regulations to the extent possible.

Because the Act is being repealed in connection with its codification into the Finance Code, by Act of May 24, 1997, House Bill 10, §1, 75th Legislature, effective September 1, 1997, citations to statutes in the sections as adopted have been non-substantively modified to correctly cite to the Finance Code.

No comments were received regarding adoption of the new subchapter.

The new sections are adopted under the Act, §1.012(a) (Finance Code, §31.003(a), effective September 1, 1997), which authorizes the commission to adopt rules to accomplish the purposes of the Act, to implement and clarify the Act, to preserve the safety and soundness of state banks, and to grant the same rights and privilege to state banks that are or may be granted to national banks domiciled in Texas. As required by the Act, §1.012(b) (Finance Code, §31.003(b), effective September 1, 1997) , the commission considered the need to promote a stable banking environment, provide the public with convenient, safe, and competitive banking services, preserve and promote the competitive parity of state banks with national banks and other depository institutions in this state consistent with the safety and soundness of state banks and the state bank system, and allow for economic development within this state.

§15.101. Definitions.

(a) Words and terms used in this subchapter that are defined in the Finance Code, Title 3, Subtitle A, have the same meanings as defined in the Finance Code.

(b) The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates the contrary.

(1) Annual report–Formal financial statements and accompanying narrative of management issued yearly for the benefit of shareholders and other interested parties.

(2) Chartering agency–A government authority that has chartering jurisdiction over an entity involved in a transaction under this subchapter.

(3) Conversion–The conversion of a state bank into a successor form of financial institution pursuant to the Finance Code, §32.501, or the conversion of a financial institution into a state bank pursuant to the Finance Code, §32.502.

(4) Corporation or domestic corporation–A corporation for profit subject to the provisions of the Texas Business Corporation Act, except a foreign corporation.

(5) CRA–The federal Community Reinvestment Act, 12 United States Code, §§2901 et seq.

(6) Current financial statements– Audited financial statements dated as of a date not more than 180 days prior to the date of submission of an application, or unaudited financial statements dated as of a date not more than 90 days prior to the date of submission of an application.

(7) Financial institution–A bank, savings association, savings bank, or credit union.

(8) Foreign corporation–A corporation for profit organized under laws other than the laws of this state.

(9) Low-quality asset–An asset as defined in 12 United States Code, §371c(b)(10), currently an asset that falls in any one or more of the following categories:

(A) an asset classified as "substandard," "doubtful," or "loss," or treated as "other loans especially mentioned" in the most recent report of examination or inspection of an affiliate prepared by either a federal or state supervisory agency;

(B) an asset in a nonaccrual status;

(C) an asset on which principal or interest payments are more than thirty days past due; or

(D) an asset whose terms have been renegotiated or compromised due to the deteriorating financial condition of the obligor.

(10) Material administrative proceeding–A past or pending proceeding by a state, federal, or foreign regulatory agency against the applicant or other person involved in a transaction under this subchapter that resulted in or could result in the issuance of a cease and desist, removal, enforcement action, determination letter or other order, including an order of supervision or conservatorship; excluding, however, a past proceeding that resulted in an order, other than a removal order, that has been satisfied or otherwise terminated more than five years prior to the date the application or notice requesting such information is submitted.

(11) Material legal proceeding–

(A) a past or pending criminal proceeding against the applicant or other person involved in a transaction under this subchapter that resulted or may result in conviction of the applicant or other person of a crime under a state or federal law or the law of a foreign country relating to banks, other financial institutions, securities, financial instrument reporting, or another crime involving moral turpitude; or

(B) a past or pending proceeding that has or may result in a judgment against the applicant or other person or entity involved in a transaction under this subchapter and the loss contingency must be disclosed in the financial statements of the entity under generally accepted accounting principles, or is otherwise material.

(12) Merger–A transaction that is:

(A) the division of a financial institution into two or more new financial institutions or into a surviving financial institution or one or more new financial institutions, domestic or foreign corporations, or other entities, at least one of which is a state bank or is not a financial institution; or

(B) the combination of one or more financial institutions with one or more financial institutions, domestic or foreign corporations, or other entities, at least one of which is a state bank, resulting in:

(i) one or more surviving financial institutions, domestic or foreign corporations, or other entities;

(ii) the creation of one or more new financial institutions, domestic or foreign corporations, or other entities; or

(iii) one or more surviving financial institutions, domestic or foreign corporations, or other entities and the creation of one or more new financial institutions, domestic or foreign corporations, or other entities; or

(C) another transaction involving a financial institution or other entity, at least one of which is a state bank, which is considered a merger under the Texas Business Corporation Act, Article 1.02(12)(g).

(13) Other entity–An entity, whether or not organized for profit, other than a financial institution or a domestic or foreign corporation, including without limitation a not-for-profit corporation, limited or general partnership, joint venture, joint stock company, cooperative, association, insurance company, trust company, or other legal entity organized pursuant to the laws of this state or another state or country to the extent such laws or the constituent documents of that entity, consistent with such laws, permit that entity to enter into a merger or share exchange subject to this subchapter.

(14) Principal executive officer–An officer primarily responsible for the execution of board policies and operation of the bank in accordance with the Finance Code, §33.106.

(15) Purchase of assets–The purchase other than in the ordinary course of business of all, substantially all, or a part of the assets of a state bank or another entity.

(16) Regulatory restriction–A memorandum of understanding, determination letter, notice of determination, order to cease and desist, or other state or federal administrative enforcement order issued by a state or federal banking regulatory agency, or another limitation imposed on a financial institution by a state or federal banking regulatory agency that restricts its ability to act without authorization from the regulatory agency imposing the condition.

(17) Resulting state bank–A state bank subject to the provisions of this subchapter that is a surviving entity in a merger.

(18) Sale of assets–The sale, lease, exchange, or other disposition of substantially all of the assets of a state bank other than in the ordinary course of business.

(19) Share exchange–A transaction by which one or more financial institutions, domestic or foreign corporations, or other entities acquire all of the outstanding shares of one or more classes or series of one or more state banks under the authority of the Finance Code, §32.008, and the Texas Business Corporation Act, Article 5.02.

(20) Substantially all of the assets–More than 50% of the assets or assets sufficient to materially impact the net earnings of a state bank involved in a transaction under this subchapter.

(21) Verified–Documents submitted by the applicant that have been attested to as true and correct. Attested documents filed pursuant to this subchapter are not required to be notarized.

§15.102. General.

Without the prior written consent of the banking commissioner, a state bank may not consummate a merger, conversion, sale of assets, purchase of assets, or share exchange. Except as otherwise provided in the Finance Code, Chapter 32, Subchapters D, E, and F, or in this subchapter, an application must be filed with the banking commissioner for review and consideration of the proposed transaction.

§15.103. Expedited Filings.

(a) A financial institution that would be an eligible bank as defined in §15.1 of this title (relating to Definitions) if it was a state bank may file an expedited filing in lieu of an application required under §15.104 of this title (relating to Application for Merger or Share Exchange), §15.105 of this title (relating to Application for Authority to Purchase Assets of Another Financial Institution), or §15.108 of this title (relating to Conversion of a Financial Institution into a State Bank), and simultaneously tender the required filing fee pursuant to §15.2 of this title (relating to Filing Fees and Cost Deposits).

(b) An expedited filing consists of a letter application including, except to the extent waived by the banking commissioner, the following items:

(1) a summary of the transaction;

(2) a current proforma balance sheet and income statement for all parties to the transaction, with adjustments, reflecting the proposed transaction as of the most recent quarter ended immediately prior to the filing of the application, demonstrating th at each resulting state bank is well capitalized as defined in 12 Code of Federal Regulations, §325.103;

(3) an executed opinion of counsel conforming to the requirements of the section of this subchapter that would apply had the applicant not filed an expedited filing;

(4) copies of all other required regulatory notices or filings submitted concerning the transaction; and

(5) a copy of the public notice published in conformity with the section of this subchapter that would apply had the applicant not filed an expedited filing.

(c) The banking commissioner shall notify the applicant on or before a date that is 15 days after receipt of the application if expedited filing treatment is not available under this section for any reason. Such notification must be in writing and must indicate the reason expedited treatment is not available. Notification is effective when mailed by the banking commissioner and is not subject to appeal.

(d) The banking commissioner may deny expedited filing treatment to an otherwise eligible applicant, in the exercise of discretion, if the banking commissioner finds that the application involves one or more of the following:

(1) the proposed transaction involves significant policy, supervisory, or legal issues;

(2) approval of the proposed transaction is contingent on additional statutory or regulatory approval by the banking commissioner or another state or federal regulatory agency;

(3) the proposed transaction contemplates a resulting entity that is not a financial institution;

(4) the proposed transaction involves a financial institution or other entity that is not domiciled in Texas;

(5) the proposed transaction would cause the assets of a resulting state bank to increase more than:

(A) 100% if it had total assets of one billion dollars or less prior to the transaction; or

(B) 35% if it had total assets of more than one billion dollars prior to the proposed transaction.

(6) the proposed transaction involves a state bank that has experienced, since the last commercial examination by a state or federal regulatory agency, asset growth, through acquisition or otherwise, greater than:

(A) 100% if it had total assets of one billion dollars or less at the last examination; or

(B) 35% if it had total assets of more than one billion dollars at the last examination.

(e) The banking commissioner shall approve or deny an expedited filing on or before a date that is 30 days after the date the expedited filing is accepted for filing pursuant to §15.4 of this title (relating to Required Information and Abandoned Filings). The banking commissioner may, in the exercise of discretion, before the expiration of the period for decision, give the applicant written notice that the banking commissioner will convene a hearing to obtain evidence related to the application, and the decision will thereafter be made in accordance with §15.113 of this title (relating to Approval; Conditional Approval; Denial of Application; Hearings).

(f) The applicant bears the burden to supply all material information necessary to enable the banking commissioner to make a fully informed decision regarding the expedited filing.

§15.104. Application for Merger or Share Exchange.

(a) Scope. This section governs an application for merger or share exchange pursuant to the Finance Code, §§32.301-32.303 and 32.008. This section does not apply to a merger, reorganization, or conversion of a state bank into another form of financial institution pursuant to the Finance Code, §32.501, governed by §15.107 of this title (relating to Notice of Merger, Reorganization, or Conversion of a State Bank Into Another Form of Financial Institution).

(b) Form of application. The applicant shall submit a fully completed, verified application on a form prescribed by the banking commissioner and simultaneously tender the required filing fee pursuant to §15.2 of this title (relating to Filing Fees and Cost Deposits). The application must, except to the extent waived by the banking commissioner, include the following information:

(1) a summary of the proposed transaction;

(2) a copy of all agreements related to the proposed transaction executed by an authorized representative of each party to the merger or share exchange;

(3) articles and plan of merger or share exchange in accordance with the Texas Business Corporation Act, Part V, which must include the following:

(A) a current draft of the articles of merger or share exchange, and such number of additional copies equal to the number of surviving, new, or acquired entities, executed and acknowledged by an authorized officer for each party to the merger or share exchange;

(B) the plan of merger or share exchange;

(C) the restated articles of association of each resulting state bank;

(D) the restated articles of incorporation or association, or other constitutive documents, of each surviving entity other than the resulting state bank;

(E) the articles of incorporation or association, or other constitutive documents, of each new resulting entity;

(F) if a party to a merger is an entity required to file documents with the Texas secretary of state before the transaction can be legally consummated, a provision in the articles of merger conditioning the merger upon the approval of the banking commissioner, containing wording substantially as follows, as applicable: This merger shall become effective upon the final approval and filing of the articles of merger by the Secretary of State of Texas and with the Banking Commissioner of Texas which shall be on or before _____ (date), which is the 90th day after the date of filing of such articles of merger with the Secretary of State;

(4) for each party to the merger or share exchange, a certified copy of those portions of the minutes of board meetings and shareholder or participant meetings at which action was taken regarding approval of the merger or share exchange, or a certificate of an officer verifying the action taken by the board of directors and the shareholders or participants approving the merger or share exchange, or an explanation of the basis for concluding such action was not required;

(5) for each resulting state bank, an assessment of its future prospects, proposed officers and directors, and proposed branches and other locations;

(6) an assessment of the current regulatory and financial condition of each party to the transaction;

(7) if a merger or share exchange will change the existing CRA delineated community of a resulting state bank, a copy of a map depicting the proposed delineated community of the resulting state bank;

(8) a copy of current financial statements for each entity involved in the proposed transaction, accompanied by an affidavit of no material change dated no earlier than 30 days prior to the date of submission of the application;

(9) a copy of the latest annual report for each financial institution and bank holding company involved in the proposed transaction;

(10) a copy of that portion of the most recent watch list for each financial institution involved in the proposed transaction that identifies low-quality assets;

(11) a description of the due diligence review conducted by or for a state bank that is a party to the transaction and a summary of findings;

(12) a description of all material legal or administrative proceedings involving any party to the merger or share exchange;

(13) an opinion of legal counsel that conforms with §15.109 of this title (relating to Opinion of Legal Counsel), concluding the following:

(A) the merger or share exchange has been duly authorized by the board and shareholders or participants of each participating state bank in accordance with the Finance Code, §32.301, and the Texas Business Corporation Act;

(B) the merger or share exchange will not cause or result in a material violation of the laws of this state relative to the organization and operation of state banks;

(C) all deposit and other liabilities of every state bank that is a party to the merger or share exchange will be discharged or otherwise assumed or retained by a financial institution that is authorized by law to do so;

(D) each surviving, new, or acquiring entity that is not a financial institution will not be engaged in the unauthorized business of banking, and each resulting state bank will not be engaged in a business other than banking or a business incidental to banking; and

(E) all conditions with respect to the merger or share exchange that have been imposed by the banking commissioner have been satisfied or otherwise resolved or, to the best knowledge of legal counsel, no such conditions have been imposed;

(14) a copy of each filing or application regarding the proposed merger or share exchange that is required to be made with another governmental authority, complete with all related attachments, exhibits, and correspondence;

(15) a current pro forma balance sheet and income statement for each party to the transaction, with adjustments, reflecting the proposed merger or share exchange as of the most recent quarter ended immediately prior to the filing of the application;

(16) a copy of the strategic plan that complies with the department's Memorandum 1009, including projections of the balance sheet and income statement of each resulting state bank as of the quarter ending one year from the date of the pro forma financial statement required by paragraph (15) of this subsection;

(17) an explanation of compliance with or nonapplicability of provisions of governing law relating to rights of dissenting shareholders or participants to the merger or share exchange;

(18) a copy of all securities offering documents, proxy statements, or other disclosure materials delivered or to be delivered to shareholders or participants of a party concerning the merger or share exchange;

(19) an explanation of the manner and basis of converting or exchanging any of the shares or other evidences of ownership of an entity that is a party to the merger or share exchange into shares, obligations, evidences of ownership, rights to purchase securities, or other securities of one or more of the surviving, acquiring, or new entities, into cash or other property, including shares, obligations, evidences of ownership, rights to purchase securities, or other securities of another person or entity , or into a combination of the foregoing;

(20) for antitrust purposes, an analysis of the anticipated competitive effect of the proposed transaction in the affected markets and a statement of the basis of the analysis of the competitive effects, or alternatively, a copy of the analysis of competitive effects of the proposed transaction addressed in the companion federal regulatory agency application; and

(21) such other information that the banking commissioner, in the exercise of discretion, requires to be included in the particular application as considered necessary to an informed decision to approve or deny the proposed merger or share exchange.

(c) Applicant's duty to disclose. The applicant bears the burden to supply all material information necessary to enable the banking commissioner to make a fully informed decision regarding the application.

(d) Public notice. Within 14 days prior to or after submission of the initial application, the applicant shall publish notice in accordance with the requirements of §15.5 of this title (relating to Public Notice) in the specified communities where th e home office of the applicant, the target entity, and the resulting bank are or will be located.

(e) Approval by the banking commissioner and filings with a chartering agency.

(1) The banking commissioner shall approve a merger or share exchange only if the application indicates substantial compliance with all conditions of the Finance Code, §32.302(b).

(2) If a party is required to file articles of merger or exchange with its chartering agency after acceptance for filing pursuant to §15.4(b) of this title (relating to Required Information and Abandoned Filings), an applicant for merger or share exchange shall file the original articles of merger or exchange as certified by the chartering agency with the banking commissioner.

(3) After approval of an application under this section by the banking commissioner, the articles of merger or exchange previously filed with the chartering agency, if applicable, will be accepted and a certificate of merger or exchange will be issued by the banking commissioner who shall perform the duties required by the Finance Code, §32.302(c). With respect to a transaction that requires filing with the Texas secretary of state, if the banking commissioner does not approve the articles of merger or exchange on or before the 90th day after the filing of the articles of merger or exchange with the Texas secretary of state, the applicant shall refile the articles of merger or exchange with both the Texas secretary of state and with the banking commissioner.

(4) After issuance of the certificate of merger or exchange by the banking commissioner, the applicant shall file a statement with the chartering authority, if applicable, certifying as to the date that each future event upon which the effectiveness of the merger was conditioned has been satisfied.

(5) The date of issuance of the certificate of merger by the banking commissioner is the date of approval unless the merger agreement provides for a later effective date approved by the banking commissioner pursuant to the Finance Code, §32.302(d).

§15.105. Application for Authority to Purchase Assets of Another Financial Institution.

(a) Scope. This section governs an application for the purchase of assets pursuant to the pursuant to the Finance Code, §§32.001(c) and 32.401-32.404.

(b) Form of application. The applicant shall submit a fully completed, verified application on a form prescribed by the banking commissioner and simultaneously tender the required filing fee pursuant to §15.2 of this title (relating to Filing Fees an d Cost Deposits). The application must, except to the extent waived by the banking commissioner, include the following information:

(1) a summary of the proposed transaction, including a description of the types and total dollar amounts of liabilities and obligations expressly assumed;

(2) a copy of all agreements related to the proposed transaction executed by an authorized representative of each party to the transaction;

(3) for each party to the transaction, a certified copy of those portions of the minutes of board meetings and shareholder or participant meetings at which action was taken regarding approval of the transaction, or a certificate of an officer verifying the action taken by the board of directors and the shareholders or participants approving the transaction, or an explanation of the basis for concluding such action was not required;

(4) an assessment of the applicant's future prospects, proposed officers and directors, and proposed branches and other locations;

(5) an assessment of the current regulatory and financial condition of each party to the transaction;

(6) if the proposed transaction will change the existing CRA delineated community of the applicant, a copy of the proposed CRA map depicting the proposed delineated community of the applicant;

(7) a copy of current financial statements for each entity involved in the proposed transaction, accompanied by an affidavit of no material change dated no earlier than 30 days prior to the date of submission of the application;

(8) a copy of the latest annual report for each financial institution and bank holding company involved in the proposed transaction;

(9) a copy of that portion of the most recent watch list for the applicant and that portion of the watch list of the selling party that identifies low-quality assets being acquired or liabilities being assumed;

(10) a description of the due diligence review conducted by or for the applicant and a summary of findings;

(11) a description of all material legal or administrative proceedings involving the applicant;

(12) an opinion of legal counsel that conforms with §15.109 of this title (relating to Opinion of Legal Counsel), concluding the following:

(A) the transaction will not cause or result in a material violation of the laws of this state relative to the organization and operation of state banks;

(B) the liabilities and obligations of the purchasing bank will be limited to those expressly assumed under the purchase agreement, unless otherwise required by law; and

(C) all conditions with respect to the transaction imposed by the banking commissioner have been satisfied or otherwise resolved or, to the best knowledge of legal counsel, no such conditions have been imposed;

(13) a copy of each filing regarding the proposed transaction that is required to be made with another governmental authority, complete with all related attachments, exhibits, and correspondence;

(14) a current pro forma balance sheet and income statement of the applicant, with adjustments, reflecting the proposed transaction as of the most recent quarter ended immediately prior to the filing of the application;

(15) a copy of the applicant's strategic plan that complies with the department's Memorandum 1009, including projections of the balance sheet and income statement of the applicant as of the quarter ending one year from the date of its current pro forma financial statement required in accordance with paragraph (14) of this subsection;

(16) an explanation of the manner and basis of valuing any of the shares or other evidences of ownership of an entity that is to constitute part of the consideration used to acquire assets;

(17) the location of each new branch of the applicant that will result from the transaction,

(18) for antitrust purposes, an analysis of the anticipated competitive effect of the proposed transaction in the affected markets and a statement of the basis of the analysis of the competitive effects, or alternatively, a copy of the analysis of competitive effects of the proposed transaction addressed in the companion federal regulatory agency application, if applicable; and

(19) such other information that the banking commissioner, in the exercise of discretion, requires to be included in the particular application as considered necessary to an informed decision to approve or deny the proposed transaction.

(c) Applicant's duty to disclose. The applicant bears the burden to supply all material information necessary to enable the banking commissioner to make a fully informed decision regarding the application.

(d) Public notice. Within 14 days prior to or after submission of the initial application, the applicant shall publish notice in accordance with the requirements of §15.5 of this title (relating to Public Notice) in the specified communities where th e home offices of the applicant and other financial institutions involved in the transaction are located.

§15.106. Application for Authority to Sell Assets.

(a) Scope. This section governs an application for the sale of assets pursuant to the Finance Code, §32.405. Subsection (e) of this section specifically addresses a sale of assets without shareholder approval under the Finance Code, §32.405(a).

(b) Form of application. A state bank seeking to sell all or substantially all of its assets after obtaining approval of its shareholders shall submit a plan of voluntary dissolution and liquidation to the banking commissioner for approval under the Finance Code, §§32.405(c) and 36.101 et seq, and such a transaction

is outside the scope of this section. A state bank that seeks to continue engaging in the business of banking after selling substantially all of its assets, as that term defined in §1 5.101(b)(19) of this title (relating to Definitions), may not consummate the sale of assets without the written approval of the banking commissioner. The applicant shall submit a fully completed, verified application on a form prescribed by the banking commissioner and simultaneously tender the required filing fee pursuant to §15.2 of this title (relating to Filing Fees and Cost Deposits). The application must, except to the extent waived by the banking commissioner, include the following information:

(1) a summary of the proposed transaction, including a description of the types and total dollar amounts of assets and liabilities transferred;

(2) a copy of all agreements related to the proposed transaction executed by an authorized representative of each party to the transaction;

(3) for each party to the transaction, a certified copy of those portions of the minutes of board meetings and shareholder or participant meetings at which action was taken regarding approval of the transaction, or a certificate of an officer verifying the action taken by the board of directors and the shareholders or participants approving the transaction, or an explanation of the basis for concluding such action was not required;

(4) an assessment of the continuing viability of the applicant, including a description of its future prospects, proposed officers and directors, and proposed branches and other locations;

(5) an assessment of the current regulatory and financial condition of each party to the transaction;

(6) if the proposed transaction will change the existing CRA delineated community of the applicant, a copy of the proposed CRA map depicting the proposed delineated community of the applicant;

(7) a copy of current financial statements for each entity involved in the proposed transaction, accompanied by an affidavit of no material change dated no earlier than 30 days prior to the date of submission of the application;

(8) a copy of the latest annual report for each financial institution and bank holding company involved in the proposed transaction;

(9) that portion of the watch list of the applicant that identifies low-quality assets being sold or related liabilities being transferred;

(10) a description of all material, legal or administrative proceedings involving the applicant;

(11) an opinion of legal counsel that conforms with §15.109 of this title (relating to Opinion of Legal Counsel), concluding the following:

(A) the sale of assets by the applicant has been duly authorized by the board and shareholders or participants of the applicant in accordance with the Texas Business Corporation Act, or that such authorization is not required, stating the basis for that conclusion;

(B) the transaction will not cause or result in a material violation of the laws of this state relative to the organization and operation of state banks;

(C) all deposit liabilities transferred in the transaction will be discharged or otherwise assumed or retained by a financial institution that is authorized by law to do so;

(D) each purchasing entity that is not a financial institution will not be engaged in the unauthorized business of banking; and

(E) all conditions with respect to the transaction imposed by the banking commissioner have been satisfied or otherwise resolved or, to the best knowledge of legal counsel, no such conditions have been imposed;

(12) a copy of each filing regarding the proposed transaction that is required to be made with another governmental authority, complete with all related attachments, exhibits, and correspondence;

(13) a current pro forma balance sheet and income statement of the applicant, with adjustments, reflecting the proposed sale of assets as of the most recent quarter ended immediately prior to the filing of the application;

(14) a copy of the applicant's strategic plan that complies with the department's Memorandum 1009, including projections of the balance sheet and income statement of the applicant as of the quarter ending one year from the date of its current pro forma financial statement required in accordance with paragraph (13) of this subsection;

(15) an explanation of compliance with or nonapplicability of the provisions of governing law relating to the rights of dissenting shareholders;

(16) an explanation of the manner and basis of valuing any of the shares or other evidences of ownership of a party that will constitute part of the consideration received for the sold assets;

(17) for antitrust purposes, an analysis of the anticipated competitive effect of the proposed transaction in the affected markets and a statement of the basis of the analysis of the competitive effects, or alternatively, a copy of the analysis of competitive effects of the proposed transaction addressed in the companion federal regulatory agency application, if applicable; and

(18) such other information that the banking commissioner, in the exercise of discretion requires to be included in the particular application as considered necessary to an informed decision to approve or deny the proposed transaction.

(c) Applicant's duty to disclose. The applicant bears the burden to supply all material information necessary to enable the banking commissioner to make a fully informed decision regarding the application.

(d) Public notice. Within 14 days prior to or after submission of the initial application, the applicant shall publish notice in accordance with the requirements of §15.5 of this title (relating to Public Notice) in the community where its home office is located and in such other communities as the banking commissioner may direct.

(e) Sale of assets without shareholder approval under the Finance Code, §32.405(a). The board of a state bank, with the prior

written approval of the banking commissioner, may cause a bank to sell all or substantially all of its assets without shareholder or participant approval if the banking commissioner finds the interests of depositors and creditors are jeopardized because of insolvency or imminent insolvency and that the sale is in their best interest.

(1) To obtain approval of the banking commissioner under this subsection, the applicant shall submit a verified application on a form prescribed by the banking commissioner and simultaneously tender the required filing fee pursuant to §15.2 of this title. The application must, except to the extent waived by the banking commissioner under §15.112 of this title (relating to Waiver of Requirements), include the following information:

(A) a copy of each filing regarding the sale that is required to be made with another governmental authority, complete with all related attachments, exhibits, and correspondence;

(B) a copy of the transaction agreement executed by an authorized representative of each party to the transaction, which must include an assumption and promise by the buyer to pay or otherwise discharge:

(i) all of the applicant's liabilities to depositors;

(ii) all of the applicant's liabilities for salaries of the applicant's employees incurred before the date of the sale;

(iii) obligations incurred by the banking commissioner arising out of the supervision or sale of the applicant; and

(iv) fees and assessments due the department;

(C) for each party to the transaction, a certified copy of those portions of the minutes of board meetings and, with respect to the purchaser, shareholder or participant meetings at which action was taken regarding approval of the transaction or a certificate of an officer verifying the action taken by the board of directors and the shareholders or participants approving the transaction, or in the alternative, an explanation of the basis for concluding such action was not required;

(D) a copy of current financial statements for each entity involved in the proposed transaction, accompanied by an affidavit of no material change dated no earlier than 30 days prior to the date of submission of the application;

(E) that portion of the most recent watch list of the applicant that identifies low-quality assets;

(F) a description of all material legal or administrative proceedings involving the applicant; and

(G) such other information that the banking commissioner, in the exercise of discretion, requires to be included in the particular application as considered necessary to an informed decision to approve or deny the proposed transaction.

(2) The banking commissioner shall expedite processing of an application under this subsection to the extent required to protect the interests of the depositors and creditors of the applicant. An application under this subsection is not subject to the notice and publication requirements of §15.5 of this title except as may otherwise be required by the banking commissioner.

§15.107. Notice of Merger, Reorganization, or Conversion of a State Bank Into Another Form of Financial Institution.

(a) Scope. This section governs notice of the merger, reorganization, or conversion of a state bank into another form of financial institution pursuant to the Finance Code, §32.501.

(b) Form of notice. A state bank does not cease to be subject to the jurisdiction of the banking commissioner until the banking commissioner is given written notice of intent to merge, reorganize, or convert before the 31st day preceding the date of the proposed transaction and the merger, reorganization, or conversion has otherwise become effective. The notice must, except to the extent waived by the banking commissioner, include the following information:

(1) a summary of the proposed transaction;

(2) a copy of all agreements or other documentation related to the proposed transaction executed by an authorized representative of the applicant and other parties, if any;

(3) a copy of each filing regarding the proposed transaction that is required to be filed with another governmental authority, complete with all related attachments, exhibits, and correspondence;

(4) a certified copy of those portions of the minutes of board meetings and shareholder or participant meetings at which action was taken regarding approval of the merger, reorganization, or conversion, or a certificate of an officer verifying the action taken by the board of directors and the shareholders or participants approving the merger, reorganization, or conversion;

(5) Opinion of legal counsel. An opinion of legal counsel that conforms with the requirements of §15.109 of this title (relating to Opinion of Legal Counsel), concluding the following:

(A) the merger, reorganization, or conversion of the state bank has been duly authorized by its board and shareholders or participants in accordance with the Finance Code, §32.501(b), and the Texas Business Corporation Act;

(B) all deposit and other liabilities of the state bank will be discharged or otherwise retained by the successor financial institution; and

(C) all conditions with respect to the merger, reorganization, or conversion imposed by the banking commissioner have been satisfied or otherwise resolved or, to the best knowledge of legal counsel, no such conditions have been imposed;

(6) a publisher's certificate showing publication of notice as required by subsection (c) of this section; and

(7) an explanation of compliance with the provisions of the Texas Business Corporation Act relating to rights of dissenting shareholders or participants.

(c) Notices, publication, and certificate of authority.

(1) The applicant shall submit a copy of the published notice of the proposed transaction required by the successor regulatory authority or shall publish notice as required by §15.5 of this title (relating to Public Notice). Submission of such notice, with the publisher's certificate required by subsection (b)(6) of this section, is considered notice of the transaction in accordance with the Finance Code, §32.501(c)(2). The banking commissioner may require, upon written notice to the applicant, such other publication requirements at such times and places and in such manner as considered appropriate.

(2) Within 14 days after receipt of the certificate of authority to do business, or such other document issued by the successor regulatory authority authorizing the consummation of the merger, reorganization, or conversion, the successor financial institution shall provide written notice to the banking commissioner of the effective date and a copy of the certificate of authority or other document.

(d) Filing fees. A filing fee is not required in connection with notice under this section.

§15.108. Conversion of a Financial Institution into a State Bank.

(a) Scope. This section governs the application for conversion of a financial institution into a state bank pursuant to the Finance Code, §32.502.

(b) Form of application. The applicant shall submit a fully completed, verified application on a form prescribed by the banking commissioner and simultaneously tender a filing fee in the amount required for the filing of an application for a new bank charter pursuant to §15.2 of this title (relating to Filing Fees and Cost Deposits). The application must, except to the extent waived by the banking commissioner, include the following information:

(1) a summary of the proposed transaction;

(2) a statement explaining whether the proposed state bank will be in compliance with each standard detailed in the Finance Code, §32.502(b), certified by the principal executive officer of the applicant;

(3) a copy of the plan of conversion executed by an authorized representative of the applicant;

(4) articles of conversion, including the following:

(A) the plan of conversion;

(B) the articles of association of the proposed state bank;

(C) a provision conditioning the conversion upon the approval of the banking commissioner;

(5) a certified copy of those portions of the minutes of board meetings and shareholder or participant meetings at which action was taken regarding approval of the conversion, or a certificate of an officer verifying the action taken by the board of directors and the shareholders or participants approving the conversion;

(6) an assessment of the future prospects, proposed officers and directors, and proposed branches and other locations of the proposed state bank;

(7) an assessment of the current regulatory and financial condition of the applicant;

(8) if the conversion changes the existing CRA delineated community, a copy of a map depicting the proposed delineated community of the resulting state bank;

(9) a copy of the latest annual report for the applicant and, if applicable, its holding company;

(10) a copy of that portion of the most recent watch list for the applicant that identifies low-quality assets;

(11) a description of all material legal or administrative proceedings involving the applicant or an officer, director, or principal shareholder of the applicant;

(12) an opinion of legal counsel that conforms with §15.109 of this title (relating to Opinion of Legal Counsel), concluding the following:

(A) the conversion of the applicant has been duly authorized by its board and shareholders in accordance with governing law, and the applicant has in all material respects complied with the procedures prescribed by the federal, state, or foreign laws governing the exit of the applicant from its current regulatory system;

(B) the conversion will not cause or result in any material violation of the laws of this state concerning the organization and operation of state banks;

(C) the proposed state bank will not be engaged in a business other than banking or a business incidental to banking; and

(D) all conditions with respect to the conversion imposed by the banking commissioner have been satisfied or otherwise resolved or, to the best knowledge of legal counsel, no such conditions have been imposed;

(13) a copy of each filing regarding the proposed conversion that is required to be made with another governmental authority, complete with all related attachments, exhibits and related correspondence;

(14) a current pro forma balance sheet and income statement of the applicant, with adjustments, reflecting the proposed conversion as of the most recent quarter ended immediately prior to the filing of the application;

(15) a copy of the applicant's current strategic plan with a comparison to the strategic plan requirements contained in the department's Memorandum 1009, including projections of the balance sheet and income statement of the resulting state bank as of the he quarter ending one year from the date of the pro forma financial statement required by paragraph (14) of this subsection;

(16) an explanation of compliance with or nonapplicability of the provisions of governing law relating to rights of dissenting shareholders to the conversion;

(17) a copy of all securities offering documents, proxy statements, or other disclosure materials delivered or to be delivered to shareholders in connection with the proposed conversion;

(18) an explanation of the manner and basis of converting any shares or other evidences of ownership of the applicant into shares, obligations, evidences of ownership, rights to purchase securities or other securities of the proposed state bank, into cash or other property, including shares, obligations, evidences of ownership, rights to purchase securities or other securities of another person or entity, or into any combination of these; and

(19) such other information that the banking commissioner requires, in the exercise of discretion, to be included in the particular application as considered necessary to an informed decision to approve or deny the proposed conversion.

(c) Applicant's duty to disclose. The applicant bears the burden to supply all material information necessary to enable the

banking commissioner to make a fully informed decision regarding the application.

(d) Public notice. Within 14 days prior to or after submission of an initial application under this section, the applicant shall publish notice in accordance with §15.5 of this title (relating to Public Notice) in the specified communities where the home office of the applicant is located, and where the home office of the proposed state bank will be located, if different.

(e) Approval by the banking commissioner. The banking commissioner shall approve a conversion only if the application indicates substantial compliance with all conditions of the Finance Code, §32.502(b).

§15.109. Opinion of Legal Counsel.

(a) An opinion of legal counsel required by this subchapter must be addressed to the banking commissioner and state the opinions expressed, the specific documents reviewed and the matters considered of both law and fact, as legal counsel has considered necessary or appropriate in the exercise of professional judgment for the opinions expressed, and the assumptions, qualifications, limitations, and exceptions made or taken with respect to the opinions expressed. A draft opinion may be submitted with an application under this chapter provided a final, signed opinion is delivered to the banking commissioner prior to final action on the application. Any variation in the final opinion from the draft version must be specifically called to the attention of the banking commissioner.

(b) An opinion letter required under this subchapter will be governed by and interpreted in accordance with the Third Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law (American Bar Association, 1991), available in pamphlet form as reprinted from the November 1991 issue of The Business Lawyer (Volume 47, Number 1, Page 167), (the Accord), or a successor document officially promulgated by an appropriate authority.

(c) Unless specifically noted in the opinion, the department will assume that the opinions expressed are based upon and subject to the assumptions, qualifications, limitations and exceptions set forth in the Accord, provided the Accord is incorporated by reference. In addition, whether or not stated in the Accord, if specifically noted in the opinion, counsel:

(1) need not express an opinion as to the laws of the United States or a foreign jurisdiction, except as required by §15.108(b)(12)(A) of this title (relating to Conversion of a Financial Institution into a State Bank), or the laws of a state jurisdiction other than this state;

(2) may assume that the parties to the transaction have engaged only in activities provided in their respective constitutive documents, and that all surviving parties to the transaction will engage only in activities provided in their respective constitutive documents;

(3) may assume that the transaction will be consummated in accordance with its terms as disclosed in the application; and

(4) may qualify the opinions given as opinions solely for the benefit of the department that may not be quoted in whole or in part or otherwise referred to in another document or report, and that may not be furnished to a person or entity other than the department and its representatives without the written consent of counsel, except as may be permitted or required by law, including the Finance Code, §31.303, and the Government Code, Chapter 552.

(d) Legal counsel shall specifically notify the banking commissioner of any substantive deviation from the assumptions, qualifications, limitations and exceptions allowed in this section and the Accord, and any substantive deviation from the opinion requirements of the section of this subchapter that governs a particular application. Deviations may result in a processing delay of the application to the extent additional analysis is required to understand the purpose of the deviation. A substantive deviation from the requirements of this subchapter applicable to legal opinions that is not brought to the attention of the banking commissioner will be considered a material misrepresentation in the application.

(e) Legal counsel rendering an opinion under this subchapter shall be an attorney in good standing admitted to practice before the highest court of a state, territory or district of the United States. However, legal counsel shall be well versed and professionally competent in applicable Texas law, or should seek the advice and opinion of an attorney in good standing admitted to practice before the highest courts in this state if legal counsel may not properly and ethically render opinions regarding applicable Texas law. An opinion of local legal counsel must be disclosed if relied on by legal counsel.

(f) Legal counsel rendering an opinion under this subchapter shall be independent of the applicant, the notice provider, or another person or entity required to submit an opinion of counsel pursuant to this section. Legal counsel is considered independent if able to exercise independent professional judgment and render candid advice, whether in private practice or employed by an applicant.

§15.110. Rights of Dissenting Shareholders.

The rights of dissenting shareholders or participants to a merger, share exchange, or conversion under this subchapter are governed by the Finance Code, §32.303, and the Texas Business Corporation Act or other applicable law relating to the rights of dissenters, and applicants shall provide evidence of compliance with or inapplicability of such provisions of law.

§15.111. Investigation of Application.

(a) Authority. An application under this subchapter is subject to such investigation as considered necessary, in the banking commissioner's sole discretion, in order to make an informed decision regarding an application.

(b) Costs and fees. An applicant under this subchapter shall pay reasonable costs incurred in the investigation including the cost of a required examination, as provided by §3.36(h) of this title (relating to Annual Assessments and Speciality Examination Fees) and §15.2(e) of this title (relating to Filing Fees and Cost Deposits).

(c) Examinations. The banking commissioner may consider the following factors in determining whether to require an examination of one or more of the entities to the transaction:

(1) a question exists regarding the solvency or potential solvency of the applicant or one or more of the financial institutions or other entities involved in the proposed transaction;

(2) a financial institution involved in the transaction has not been examined by a state, federal, or foreign regulatory agency within the 18 month period immediately preceding the date of submission of the application;

(3) a financial institution involved in the proposed transaction has numerous substantive violations cited in its last examination report, or has a less than satisfactory regulatory rating;

(4) a question exists regarding the experience, ability, standing, trustworthiness, or integrity of the existing or proposed officers, directors, managers or managing participants of a party involved in the proposed transaction;

(5) a question exists whether a resulting state bank will operate in compliance with the law;

(6) a question exists whether a resulting state bank will be free from improper or unlawful influence or interference from its principal shareholders with respect to operation in compliance with the law;

(7) a question exists whether a resulting state bank will have adequate capitalization;

(8) one or more of the parties to the transaction is under a regulatory restriction; or

(9) such other factors as determined in the sole discretion of the banking commissioner.

§15.112. Waiver of Requirements.

The banking commissioner, in the exercise of discretion, reserves the right to waive a requirement in this subchapter, unless specifically required by the Finance Code, Title 3, Subtitle A, or other applicable provision of federal or state law.

§15.113. Approval; Conditional Approval; Denial of Application; Hearings.

(a) Approval, conditional approval, or denial. Except for expedited filings governed by §15.103 of this title (relating to Expedited Filings), the banking commissioner shall approve or deny an application filed under this subchapter on or before a date that is 60 days after the date the application is accepted for filing pursuant to §15.4 of this title (relating to Required Information and Abandoned Filings).

(b) Pre-decision hearing. The banking commissioner may, in the exercise of discretion, before the expiration of the initial period for decision provided by subsection (a) of this section, give the applicant written notice that the banking commissioner will convene a hearing to obtain evidence related to the application. Such notice by the banking commissioner suspends the specified period for approval or denial of an application, and the banking commissioner shall approve or deny the application on or before a date that is 30 days after the date the final proposal for decision resulting from the hearing is provided to the banking commissioner and the applicant.

(c) Acceptance of conditional approval. The banking commissioner may give the applicant written notice that the application has been approved subject to certain conditions. The applicant shall provide the banking commissioner with written confirmation of acceptance of the conditions on or before a date that is 10 days after the date of notification to the applicant of the conditional approval. An agreement between the applicant and the banking commissioner concerning conditional approval is enforceable against the applicant. In the event an applicant who has received conditional approval does not provide the banking commissioner with written confirmation as required by this subsection, consummation of the transaction constitutes confirmation of acceptance of the conditions imposed by the banking commissioner and is considered for all purposes an agreement enforceable against the applicant.

(d) Requests for hearing. An applicant may request a hearing on or before a date that is 30 days after the effective date of notice of denial or conditional approval of an application under this subchapter by the banking commissioner. The request for hearing must be in writing and state with specificity the reasons the applicant alleges that the decision of the banking commissioner is in error. The applicant has the burden of proof for each issue specified in the request for hearing. The request for hearing and the banking commissioner's decision to deny or condition the application will be made a part of the record.

(e) Hearings on denial of applications. Requests for hearing under this subchapter will be forwarded to the administrative law judge who shall enter appropriate orders and conduct the hearing on or before a date that is 60 days after the date the request for hearing was received, or as soon after that as is reasonably possible, under Chapter 9 of this title (relating to Rules of Procedure for Contested Case Hearings, Appeals, and Rulemaking) and the Government Code, Chapter 2001. A proposal for decision, exceptions and replies to such proposal for decision, the final decision of the banking commissioner, and motions for rehearing are governed by Chapter 9 of this title. An applicant may not appeal denial of an application or conditional approval of an application until a final order is issued. After a hearing and final order, the applicant may appeal the final order as provided in the Finance Code, §31.202.

§15.114. Consummation of a Transaction.

A transaction under this subchapter must be consummated as proposed in the application, in the agreement concerning conditional approval, or as provided in a final order. An approved transaction under this subchapter must be consummated within 12 months after the date of approval by the banking commissioner unless an extension is granted in writing. Until a transaction is consummated, the banking commissioner may alter, suspend, or withdraw approval should an interim development warrant such action.

§15.115. Notification.

A notification by the banking commissioner under this subchapter may be by registered or certified mail, return receipt requested, and is complete when the notification is deposited in the United States mail postage prepaid, return receipt requested, mailed to the address furnished in the application. Notification may also be made in person to the applicant, or to another person, financial institution, foreign corporation or domestic corporation, or other entity subject to this subchapter, by agent-receipted delivery or by courier-receipted delivery to the address furnished in the application, or by telephonic document transfer to the applicant's telecopier number as furnished in the application. Notice by telephonic document transfer served after 6:00 p.m. local time of recipient is considered as notice served on the following day.

§15.116. Abandoned Filing.

The banking commissioner may determine an application under this subchapter to be abandoned pursuant to §15.4 of this title (relating to Required Information and Abandoned Filings).

§15.117. Confidentiality.

Information obtained by the banking commissioner under this subchapter is presumed to be public information unless such information is confidential under the Finance Code, §31.301 et seq, and §3.111 of

this title (relating to Confidential Information), or under exceptions contained in Government Code, Chapter 552. The applicant has the burden to request confidential treatment for specified information, to segregate and mark documents claimed to be confidential, and to specifically reference the pro vision of law that allows confidential treatment.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711162
Everette D. Jobe
General Counsel
Texas Department of Banking
Effective date: September 15, 1997
Proposal publication date: July 8, 1997
For further information, please call: (512) 475–1300

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Chapter 29. Sale of Checks Act

7 TAC §29.3

The Finance Commission of Texas (the commission) adopts new §29.3, concerning exemption from licensing under the Sale of Checks Act, Texas Civil Statutes, Article 489d (the Act), with nonsubstantive changes to the text as proposed in the July 8, 1997, issue of the *Texas Register* (22 TexReg 6398).

Pursuant to the Act, §4(b) (Finance Code, §152.103, effective September 1, 1997), new §29.3 provides that a person engaged in commercial transactions in interstate commerce, providing certain financial services that facilitate the provision of c ash, goods, or services to motor carriers and their employees through the ancillary sale of checks, and who is not engaged in the business of selling checks to the public, can be exempt from the licensing requirements of the Act. An application accompanied by a $100 filing fee to offset the cost of processing is required to claim the exemption.

Because the Act is being repealed in connection with its codification into the Finance Code, by Act of May 24, 1997, House Bill 10, §1, 75th Legislature, effective September 1, 1997, citations to statutes in the sections as adopted have been non-substantively modified to correctly cite to the Finance Code.

The commission received no comments on the proposal.

Adoption of this section is made under the Act, §9E (Finance Code, §152.102(a), effective September 1, 1997), which authorizes the commission to adopt rules necessary for the enforcement and administration of the Act. As required by the Act, §4(b) (Finance Code, §152.103(2), effective September 1, 1997), the banking commissioner has determined that proposed new §29.3 is in the public interest.

§29.3. Exemption For Commercial Transactions.

(a) Definitions. Words and terms used in this section that are defined in the Finance Code, §152.002, have the same meanings as defined in the Finance Code. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Ancillary–Incidental or secondary to a person's regular trade or business.

(2) Interstate commerce–The transportation of goods between Texas and other states located in the United States or the transaction of commerce between persons residing in different states.

(3) Motor carrier–A state or federally licensed person that controls, operates, or directs the operation of one or more vehicles that transport goods over a road or highway.

(4) Public–A person other than a person that has assets of $25 million or more or that is owned or controlled by a corporation or entity with assets of $25 million or more.

(b) Exemption. In accordance with the Finance Code, §152.103, a person who facilitates the provision of cash, goods, and services through the ancillary sale of checks or other payment devices is exempt from the licensing requirements of the Finance Code, Chapter 152, if the person:

(1) sells checks or other payment devices solely to or for the benefit of a motor carrier and its employees; and:

(A) the motor carrier is engaged in interstate commerce; or

(B) the sale of checks or other payment devices occurs in interstate commerce; and

(2) does not engage in the business of selling checks to the public.

(c) Application and fee. A person requesting an exemption under this section must file a written application with the banking commissioner, accompanied by a filing fee of $100, demonstrating that the person qualifies for the exemption and undertakes to engage only in activities consistent with continued eligibility. The banking commissioner shall grant the exemption if the banking commissioner finds that the applicant meets the requirements of this section. If the exemption is granted, the banking commissioner shall mail a certificate of exemption to the applicant.

(d) Representation of purchaser. In determining compliance with the terms of the exemption provided by this section, a seller may rely on the representations of a purchaser regarding the purchaser's assets unless the seller knows or reasonably should know that the representation is false.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711161
Everette D. Jobe
General Counsel
Texas Department of Banking
Effective date: September 15, 1997
Proposal publication date: July 8, 1997
For further information, please call: (512) 475–1300

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TITLE 10. COMMUNITY DEVELOPMENT

Part V. Texas Department of Commerce

Chapter 174. Defense Economic Adjustment Assistance Grant Program

10 TAC §§174.1–174.11

The Texas Department of Commerce (department), on behalf of the Texas Department of Economic Development, adopts new §§174.1-174.11, implementing the Defense Economic Adjustment Assistance Grant Program authorized by the 75th Legislature in Senate Bill (SB) 227 through the addition of Texas Government Code, Chapter 486. Sections 174.1-174.11 are being adopted without changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6521), and will not be republished.

The rules are being adopted in order to implement the Defense Economic Adjustment Assistance Grant Program in compliance with SB 227, which became effective on June 18, 1997. Section 486.002(d) requires the Texas Department of Commerce Policy Board to adopt rules for the implementation of the grant program established by SB 227. The Defense Economic Adjustment Assistance Grant Program was created by the 75th Legislature to provide state funding for the purposes of acquiring federal grant assistance or for sharing in the cost of redevelopment of communities that have been adversely affected by defense downsizing. The rules are designed to provide standards of eligibility and procedures for obtaining assistance under the program.

Section 174.1 sets forth the purpose of and definitions for the program.

Section 174.2 establishes the period of time during which grant funds may be expended.

Section 174.3 sets forth grant eligibility criteria.

Section 174.4 describes acceptable source documentation for establishing grant eligibility.

Section 174.5 sets forth minimum and maximum award amounts, the percentage of project investment that may be provided by grant funds, and the certification required from local governments applying for grants, documenting their attempts to acquire funding from various sources and/or their inability to acquire adequate matching funds or investments.

Section 174.6 provides that the department may develop a formal application form and sets forth the minimum contents for an application.

Section 174.7 sets forth a process for submission and review of applications, including provisions for the appointment by the department's executive director of a five-member review panel to be appointed by the executive director to review, evaluate, and make recommendations regarding grant applications to the governing board.

Section 174.8 sets forth the circumstances under which program funds will be committed or encumbered, subject to fund availability. The section provides for notification to applicants in the event of non-availability of funds.

Section 174.9 sets forth the minimum contractual assurances that will be required of grant awardees prior to the receipt of program funds.

Section 174.10 sets forth department responsibilities to solicit applications and publicize the grant program, to establish and conduct the evaluation and award process, to develop contracts containing adequate controls and performance measures, and to minimize repetitive and unnecessary reporting.

Section 174.11 provides for written reports from grant awardees as required by the department.

The department received comments regarding the proposed rules from the Alamo Community College District. The comments are summarized, along with the department's responses, as follows:

Comment: Section 174.1(b) of the rules states that the "primary goal is to increase employment opportunity to dislocated defense workers." Educational institutions will not be in a position to provide employment opportunity, but rather prepare defense workers for gainful employment in which they may earn wages to sustain or improve their present standard of living. The rules and regulations do not address how educational institutions may submit an application through a local governmental entity – a municipality or county governmental body or regional planning commission.

Response: The department does not agree with the comment. Senate Bill 227 emphasizes assistance for defense worker job loss. The department thinks that reemployment of defense workers through community development was the primary goal of the bill. However, an educational institution may be a subrecipient of grant funds as long as the use of the grant proceeds is permitted by SB 227, §1, to be codified at Government Code, §486.005, Use of Proceeds: "The local governmental entity may use the proceeds of the grant for the purchase of property from the department of defense or its designated agent, new construction, rehabilitation, or renovation of facilities or infrastructure, or purchase of capital equipment or insurance."

Further, SB 227, §1, to be codified at Government Code, §486.003, Eligibility for Grant, provides that municipalities, counties, and regional planning commissions are the only local governmental entities authorized to submit grant applications and receive grant funds. It is the department's understanding that the legislature intentionally narrowed the field of eligible applicants to these local governmental entities so that funding priorities would be resolved at the local level, rather than at the state level. Therefore, the department does not believe it is in a position to determine priorities for local communities, and the rules do not address the process or the criteria by which local funding priorities are to be decided. However, according to SB 227, §1, to be codified at Government Code, §486.005(b), Use of Proceeds, a local governmental entity may deliver grant funds to other local institutions, which the department thinks may include educational institutions, for use consistent with the legislation.

Comment: Section 174.3(c) of the rules specifies that "applicants for the grant must provide adequate documentation of defense workers job loss." This language does not address the

need to train workers for suitable employment *prior* to defense workers losing their jobs. It would be difficult for a defense worker to seek training while being unemployed. Ideally, the training should be provided while defense workers are still employed.

Response: The department does not agree with the comment. Both the statute and the rules address proposed as well as actual facility realignment and closure, and expected as well as actual job loss. As long as job loss can be documented adequately, either projected or actual past defense worker job loss may be acceptable to establish eligibility under the rules.

Comment: Section 174.5(b) of the rules would make it difficult for non-profit organizations, such as educational institutions, to come up with a percentage of the amount of matching funds required. Our understanding of the intent of SB 227 was to make funds available for use as matching funds for federal grants.

Response: The department does not agree with the comment. The percentages set forth at §174.5(b) of the rules are statutory and are also found in §1 of SB 227, to be codified at Government Code, §486.004(b). The department's understanding of the legislative intent was to ensure that local governmental entities were also financial participants in funding projects through the program.

The rules are proposed under the authority of the Texas Government Code, §481.0044(a), which requires the Texas Department of Commerce Policy Board to adopt rules for programs administered by the department, SB 227, enacting Government Code, §486.002(d), which requires the Policy Board to adopt rules to implement the Defense Economic Adjustment Assistance Grant program, and the Administrative Procedure Act, Texas Government Code, Chapter 2001, Subchapter B, which prescribes the standards for agency rulemaking.

Texas Government Code, Chapter 486, is affected by this proposal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711322
W. Lane Lanford
Chief Administrative Officer
Texas Department of Commerce
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 936–0181

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Chapter 175. Defence Economic Readjustment Zones

10 TAC §§175.1–175.9

The Texas Department of Commerce (department), on behalf of the Texas Department of Economic Development, adopts new §§175.1-175.9, implementing the Defense Economic Readjustment Zone Program authorized by the 75th Legislature in Senate Bill (SB) 226 through the addition of Texas Government Code, Chapter 2310. Sections 175.1-175.9 are being adopted without changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6525), and will not be republished.

The rules are being adopted in order to implement the Defense Economic Readjustment Zone Program in compliance with SB 226, which became effective on May 19, 1997. Section 2301.051(c) requires the Texas Department of Commerce Policy Board to adopt rules for the implementation of the readjustment zone program established by SB 226. The Defense Economic Readjustment Zone Program was created by the 75th Legislature to establish a process to identify areas that have been adversely affected by defense downsizing and to provide regulatory and tax incentives to encourage business to locate or expand in those areas. The rules are designed to provide standards of eligibility and procedures for obtaining readjustment zone and readjustment project designation under the program.

Section 175.1 sets forth the purpose of and definitions for the program, provides for suspension of rules, and sets forth the procedure for communicating with the department.

Section 175.2 sets forth the procedure and criteria for application for readjustment zone designation and the documentation required to establish job loss that must accompany an application.

Section 175.3 sets forth readjustment project eligibility criteria and provides that the department may designate at least one readjustment project off of the defense facility.

Section 175.4 requires a readjustment zone application to be in writing and describes the contents of the application.

Section 175.5 requires the readjustment project application to be in writing and describes the contents of the application.

Section 175.6 sets forth the process for filing readjustment zone and readjustment project applications; the process for requesting refunds, tax reductions, new job certifications, or other benefits encouraged under the program; filing fees; the process for staff review and notification of applications and certification requests; and the effective date for readjustment project designation.

Section 175.7 sets forth additional requirements for readjustment project designation.

Section 175.8 sets forth final approval standards for readjustment zone designation, the period for which the designation is in effect, the period for which a readjustment project is in effect, and the process for removal of designation as a readjustment zone or readjustment project.

Section 175.9 sets forth annual reporting requirements for the program.

No comments were received concerning the proposed rules.

The rules are adopted under the authority of the Texas Government Code, §481.0044(a), which requires the Texas Department of Commerce Policy Board to adopt rule for programs administered by the department, SB 226, enacting Government Code, §2310.051(c), which requires the Policy Board to adopt

rules to implement the Defense Economic Readjustment Zone Program, and the Administrative Procedure Act, Texas Government Code, Chapter 2001, Subchapter B, which prescribes the standards for agency rulemaking.

Texas Government Code, Chapter 2310, is affected by this proposal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711323
W. Lane Lanford
Chief Administrative Officer
Texas Department of Commerce
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 936–0181

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Chapter 186. Smart Jobs Fund Program

Subchapter A. General Provisions

10 TAC §§186.101, 186.103, 186.104, 186.106

The Texas Department of Commerce (department), on behalf of the Texas Department of Economic Development, adopts proposed amendments to §§186.101, 186.103, 186.104, and 186.106, relating to Subchapter A, General Provisions, for administration of the Smart Jobs Fund Program. Section 186.104 is adopted with changes to the proposed text as published in the June 20, 1997, issue of the *Texas Register* (22 TexReg 5877). Sections 186.101, 186.103, and 186.106 are adopted without changes and will not be republished.

The amendments are being adopted in order to comply with changes made to the Smart Jobs program by Senate Bill (SB) 932 of the 75th Texas Legislature and to clarify the meanings of terms. Section 186.104, concerning Definitions, adds definitions for consortium, class-room training, and on-the-job training that were not previously defined. The new definitions are being added to clarify the meaning of the terms for the public. Section 186.104 also adds definitions for local labor market and prevailing wage, since the amended §481.155(d) of the Smart Jobs Fund Program Act (the Act) references these terms. Changes are being made to the definition for contract to clarify the different entities which can be a party to a Smart Jobs Fund grant contract. Changes are being made to the definition of full-time employment to delete the phrase "for a period of 25 consecutive weeks," because it is not needed in administering the program. Changes are being made to the definition of minority employer status for application purposes to delete reference to meeting the qualifications for certification as a historically underutilized business and to reflect the amended definition of minority group member contained in §35 of SB 932. Changes are being made to the definitions of department and governing board to reflect statutory revisions made by the 75th Legislature. Section 186.104 also deletes definitions for emerging occupation, and manufacturing occupation since those terms are now defined in §35 of SB 932.

The definition of smart job is being modified, and the modified definition is being added back into §186.104 in response to comments received by the department. Including the modified definition does not change program administration or current program practices.

Section 186.106, concerning Modifications, is being amended to be applicable only to micro-businesses with twenty employees or fewer due to amendments to §481.155 of the Act set forth in §37 of SB 932.

The department received one comment regarding the proposed amendments. The comment recommended that the department retain the definition of Smart Job in §186.104 in order to reflect legislative intent that the Smart Jobs Fund program target the creation and retention of high-wage jobs.

The department agrees in part and disagrees in part with the comment. The definition was deleted because the department thought it did not add value and could be misleading. The term "smart job" was not used elsewhere in the rules or the statute except for the title of the program. Therefore, the department did not think the definition was necessary. In addition, the department thought that the definition could be misleading because employers might think that the program was more limited than was intended. While the definition referred to jobs requiring "high-level thinking, reasoning, and technical skills," these terms were not defined elsewhere and were applied subjectively by various employers. Further, the terms "family-wage jobs" and "high-level thinking, reasoning, and technical skills," are relative terms, as what is considered to be a high-skill, high-wage job in one area of the State may not be considered high-skill and/or high-wage in another area. Finally, the definition of smart job did not include demand jobs, jobs in manufacturing, and jobs in emerging occupations, all of which are defined in the legislation authorizing the program and intended to be included as smart jobs.

However, the department agrees that the portion of the definition that describes a smart job as a family wage job is useful in understanding the intent of the program. Therefore, the department has retained that portion of the definition of smart job and added language to clarify that demand jobs, jobs in manufacturing, and jobs in emerging occupations are also considered to be smart jobs. The definition as modified reflects current program practices and does not affect program administration.

The comment was received from the office of Senator David Sibley.

The amendments are adopted under the authority of Texas Government Code, §§481.153 and 481.0044(a), which require the Texas Department of Commerce to adopt rules to implement the Smart Jobs Fund program, and the Administrative Procedure Act, Texas Government Code, Chapter 2001, Subchapter B, Rulemaking, which prescribes the standards for agency rulemaking.

Texas Government Code, Chapter 481, Subchapter J, is affected by the amended rules.

§186.104. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

Classroom training–Training provided by an instructor to a group of trainees on a predetermined structured curriculum.

Consortium–A group that undertakes a training project in which all or most of training will be the same for each employer. A lead entity will normally assume responsibility for preparing and submitting the grant application and for being the grant administrator. The lead entity may be one of the employers, a provider or other entity acceptable to the department.

Contract–The written legally binding obligation between the department, each employer, providers, guarantors, and administrative entities which may serve as a fiscal agent.

Department–The Texas Department of Economic Development.

Governing Board–The existing board of the Texas Department of Economic Development.

Local labor market–One of many geographic areas of the State for which standardized occupational wage data is available from the Texas Workforce Commission.

Minority employer status for application purposes–Minority group members include African-Americans, American Indians, Asian-Americans, Mexican-Americans and other Americans of Hispanic origin, and women.

On-the-job training–Structured training by instruction and supervision during a period of time a trainee works on the job.

Prevailing wage–The average hourly wage paid for a specific occupation within a local labor market area and is based on the most current information provided by the Texas Workforce Commission.

Smart Job–A job that is a family wage job, a demand job, a job in manufacturing, or a job in an emerging occupation.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711325
W. Lane Lanford
Chief Administrative Officer
Texas Department of Commerce
Effective date: September 15, 1997
Proposal publication date: June 20, 1997
For further information, please call: (512) 936–0181

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Subchapter B. Methodologies for Determining Certain Variables

10 TAC §§186.201-186.203

The Texas Department of Commerce (department), on behalf of the Texas Department of Economic Development, adopts proposed amendments to §§186.201-186.203, relating to Subchapter B, Methodologies for Determining Certain Variables, for administration of the Smart Jobs Fund Program. The proposed amendments were published in the June 20, 1997, issue of the *Texas Register* (22 TexReg 5878). Sections 186.201-186.203 are adopted without changes and will not be republished.

The amendments are being adopted in order to comply with changes made to the Smart Jobs program by Senate Bill (SB) 932 of the 75th Texas Legislature, to make the rules internally consistent, and to accurately reflect current program practices. Section 186.201, concerning State Average Weekly Wage; Regional Variances, is being amended to delete the reference to state average weekly wage and to replace it with a reference to prevailing occupational wage due to statutory revisions made by the 75th Legislature in SB 932. Section 186.202, concerning Full-Time Employment, is being amended to delete any reference to waiving this section due to the definition of job in §481.151(10) which defines a job as employment on a basis customarily considered full-time for the applicable occupation and industry. Section 186.203, concerning Maintenance of Effort, is being changed to correct §186.203(b)(2) such that it applies to employers with 20 employees or less, rather than less than 20 employees.

No comments were received regarding the proposed amendments.

The amendments are adopted under the authority of Texas Government Code, §§481.153 and 481.0044(a), which require the Texas Department of Commerce to adopt rules to implement the Smart Jobs Fund program, and the Administrative Procedure Act, Texas Government Code, Chapter 2001, Subchapter B, Rulemaking, with prescribes the standards for agency rulemaking.

Texas Government Code, Chapter 481, Subchapter J, is affected by the amended rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711326
W. Lane Lanford
Chief Administrative Officer
Texas Department of Commerce
Effective date: September 15, 1997
Proposal publication date: June 20, 1997
For further information, please call: (512) 936–0181

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Subchapter C. Application for Grants

10 TAC §§186.301-186.303, 186.306-186.308

The Texas Department of Commerce (department), on behalf of the Texas Department of Economic Development, adopts proposed amendments to §§186.301-186.303 and §§186.306-186.308, relating to Subchapter C, Application for Grants, for administration of the Smart Jobs Fund Program. The proposed amendments were published in the June 20, 1997, issue of the *Texas Register* (22 TexReg 5879). Sections 186.301-186.303 and §§186.306-186.308 are adopted without changes, and, therefore, will not be republished.

The amendments are being adopted in order to comply with changes made to the Smart Jobs program by Senate Bill (SB) 932 of the 75th Texas Legislature, to more accurately reflect current program practices, and to clarify aspects of the application process that may have been misleading or confusing. Section 186.301, Concerning Eligibility, is being amended to delete the maximum cost per job for a large business based on statutory changes made by the 75th Legislature in SB 932. This section is also being amended to clarify that the cost per job is derived from the total project cost instead of the total Smart Jobs Fund grant amount. This section is also being amended to establish a maximum grant amount in any fiscal year per single employer based on statutory changes made by the 75th Legislature in SB 932. The statutory changes also provide that the maximum grant amount may be exceeded if any one of six conditions is met pursuant to §481.155(a) of the Smart Jobs Fund Program Act (the Act).

Section 186.302, concerning Application Requirements, is being amended to delete §§186.302(a)(1-3) based on new definitions added to §481.151 of the Act by SB 932. This section is also being amended to delete job descriptions and, for existing jobs, the wage on the date a training project will begin because neither is needed to approve a grant award. This section also adds the requirement that a grant applicant shall indicate if it is a small or micro-business so that the department can determine if any exceptions will apply such as wage modifications and greater attrition, and deletes women as a separate category based on statutory changes made to the definition of minority group member in §481.151 of the Act by §35 of SB 932, such that women are now included in the definition of minority group member. This section also deletes recruiting and curriculum design costs as reimbursable costs on the basis that these costs are not directly related training costs as compared to tuition, instructor wages, classroom books and materials and such costs. This section has been amended to provide that the Smart Jobs Fund will reimburse small and micro-businesses nominal and reasonable costs incurred in having a third party prepare the Smart Jobs Fund grant application. The provision is intended to permit more small and micro-businesses to access the program. This section is being amended to place a grant application on inactive status if requested information is not received by the Smart Jobs Fund within 30 business days. This change is necessary to decrease the time involved in processing grant applications and to reduce the overall processing time involved in awarding a grant to the applicant.

Section 186.303, concerning Technical Assistance, is being amended to add local workforce development boards as sources of technical assistance based on §2308.303(9) of the Labor Code. Section 186.306, concerning Funding Priorities, is being amended to delete the mandatory targets for small and micro-businesses and to conform to amendments to the Act made by SB 932. An amendment is also being proposed to reflect the Legislature's stated intent, as set out in §37 of SB 932, that the department spend money from the Smart Jobs Fund in all areas of the State. Section 186.307, concerning Provider Eligibility, is being amended to delete the requirement that a provider must demonstrate to the department that it has been in business for at least one year. This should provide greater flexibility to employers making decisions about who will be providing training.

Section 186.308, concerning Contracts and Contract Amendments, is being amended to clarify the contract performance expected from the employer in order to receive maximum reimbursement under a training grant. The amendment also clarifies that the maximum amount which an employer will receive is the amount of allowable expenditures, which may be less than the original grant award. This section is also being amended to permit the executive director to approve a higher attrition rate for micro-businesses using one of the same conditions for wage modification pursuant to §186.106 due to statutory changes made to §481.155(e) of the Act by §37 of SB 932. This should provide more micro-businesses an opportunity to access the Smart Jobs Fund.

The department received comments regarding the proposed amendments, which are summarized, with the department's responses, as follows:

Comment: Do not delete the language specifically referring to recruiting as a permissible cost related to direct training in §186.302(f)(3)(a), Application Requirements. Maintaining funds for the recruitment and screening of job applicants is extremely important to the success of recruiting new companies, especially during times of low employment. Reasonable costs of recruiting expenses should be considered if Texas is to compete with other areas of the country for jobs.

Response: The department does not agree with the comment. The reference to recruitment as an allowable cost of pre- and post-training participant assessment was deleted because of past experience with employers who submitted applications for large fund amounts with most of the costs associated with recruitment. The intent of the program is to provide grant money to improve the skill level of employees and to increase the ability of the employer to compete in a global economy. Use of the funds primarily for recruiting does not comply with legislative intent.

In addition, the primary language regarding reasonable costs for pre- and post-training assessment has been retained. Some recruitment costs may still be considered on a nominal basis under the primary language. However, this type of cost is not considered to be a direct training cost and thus should receive a lower priority. Removing the express language regarding recruitment as an allowable cost clarifies the intent to fund costs directly related to job training.

Finally, the department notes that the rules permit waivers to program requirements that are not statutorily imposed. On a showing of compelling circumstances, the department may still permit recruiting costs as a reasonable cost of the program.

Comment: The proposed amendment to §186.302(f)(3)(E), Application Requirements, would reverse current policy to allow the use of program funds to reimburse small and micro-businesses for the nominal and reasonable costs associated with hiring a third party to prepare a grant application. While the rule modification represents a good faith effort to improve small and micro-business participation in the program, there are alternative means of increasing small business participation. (1) A streamlined application process should mitigate the need for outside assistance with application preparation and avoid the problem of diverting program dollars to an administration function. (2) Application preparation assistance is already available

to small business owners from Smart Jobs staff. Additional funding for the program in the upcoming biennium should enable Smart Jobs staff to provide hands-on assistance to small business owners and to train regional entities to provide similar assistance at the local level. (3) Application assistance is available from regional entities that receive state funding, including Small Business Development Centers (SBDC) and Texas Manufacturing Assistance Centers (TMAC). Improving relationships with regional partners is an excellent way to stimulate small business participation. The department should enter into performance-based contracts with SBDC and TMAC and train regional partners, such as local chambers of commerce, local workforce development boards, utilities, etc., to assist small businesses in preparing grant applications.

Response: The department does not agree with the comment. In order to comply with legislative intent, the department must attempt to allocate 50% of available program dollars to small businesses during the next fiscal year. Based on current appropriation levels and historical averages, the department estimates 1200 small business participants in the program during the next fiscal year, compared to 60 small business participants during the fiscal year ending August 31, 1997.

The department has no additional full-time employees to commit to program administration. Therefore, while attempts are continually being made to streamline the application process, the increased participation by small businesses will dramatically reduce the amount of time that Smart Jobs staff can spend on each application. Without the availability of administrative dollars to pay for assistance with the application process, the department thinks that some small businesses will be discouraged for applying for funds. In addition, the problem of dealing with incomplete and incorrect applications will further burden the Smart Jobs staff.

While contracts with other entities receiving state funding could provide for some assistance with the application process, there are costs associated with these contracts. Many small and micro-businesses might be discouraged from participating in the program because of lack of staff and/or expertise needed to complete the application process. The department intends to increase small business participation, in part, by providing an incentive that will increase the number of entities who will market the program to small businesses locally and assist them in applying for grant dollars. This is a value-added service that is critical to the department if it is to achieve the level of participation mandated by the legislature.

Comment: Add language to §186.302(g)(4), Application Requirements, to require the executive director to consult with the Local Workforce Development Board before acting on an application. This will ensure that Smart Jobs funds are distributed in a manner that is harmonious with the goals of the appropriate Local Workforce Development Board and maximizes the impact of the funds and other programs administered by the Boards and will assist the Board in its responsibility to review applications for funds under the program.

Response: The department does not agree with the comment. While the department recognizes the importance of working closely with Local Workforce Development Boards, the appropriate role of the Boards is in marketing the program and providing technical assistance to local businesses. The legislation enacting the Smart Jobs Fund Program does not mention Board involvement. Adding Board review to the application process will add a layer of bureaucracy that will probably delay action on pending applications. In addition, Board review may require additional staffing and expertise at the local level, possibly driving up the cost of the program to local communities.

Comment: One comment expressed support for the proposed amendments to §186.303, Technical Assistance.

Response: The department agrees with the comment.

Comment: Retain the requirement that all Smart Jobs applications meet a minimum scoring threshold under §186.306(b), Funding Priorities. Although the proposed change appears to be driven by the goal of increasing small business participation in the program, the minimum standards should be met by all applicants for state grants and should be retained.

Response: The department does not agree with the comment. The rule change to no longer require small businesses to meet minimum scoring thresholds is intended to eliminate unnecessary paperwork, consistent with streamlining the application process. The small business participants must still meet statutory program eligibility requirements, such as remaining current on state tax obligations, having been in existence for at least one year, and employing at least one employee. Removing small businesses from the scoring process will ensure that more small businesses receive grants under the program.

Under the old scoring process, most small businesses met the threshold test simply by virtue of being a small business, because 25 points toward the 35 point threshold were awarded if the applicant had fewer than 100 employees. In order to continue to encourage small business participation, eliminate unnecessary paperwork, and ensure funding of large businesses in accordance with legislative intent, the department will use a scoring process only for large businesses beginning in fiscal year 1998. The scoring mechanism for use with large businesses in fiscal year 1998 incorporates legislative funding priorities by awarding points to large businesses for factors such as manufacturing, location in an enterprise zone, or minority ownership.

Comment: Add a new §186.306(b)(5), Funding Priorities, to adjust the scoring mechanism to include the goals and plans of the Local Workforce Development Board in the priority funding criteria. The purpose of this proposed addition is to align priorities for funding applications with goals of the Boards.

Response: The department does not agree with the comment. The Smart Jobs Fund Program promotes employer-driven, customized job training in connection with program funding priorities. The priorities are based on the legislation establishing the program; there is no statutory basis for adding the suggested priority. Therefore, adding additional priorities would place additional requirements on employers that might not be harmonious with the intent of the legislation. In addition, adding priorities would add more bureaucracy without adding value and without a predictable outcome and would increase the time needed to process applications. The express legislative mandate is to streamline the application process.

The department thinks that the Local Workforce Development Boards should provide their goals and plans to the Smart Jobs Fund staff for the staff to review for appropriateness and include as necessary. The staff currently works with Boards and the Texas Workforce Commission to determine the best way to interface and coordinate with the Boards. The department does not think that this cooperation needs to be mandated by rule.

Comment: Add language in §186.306 to make high-wage jobs a funding priority.

Response: The department agrees in part and disagrees in part with the comment. The funding priorities set out in §186.306(a) are statutory. The funding priorities set out in §186.306(b) for use in the department's scoring process for large businesses already make high-wage jobs a priority by including a priority for "the quality of jobs, including . . . wage levels."

Further, the department must balance assistance to employers providing high-wage jobs with assistance to employers providing demand jobs. The department and the legislation creating the Smart Jobs Fund Program recognize that the term "high-wage" has different meanings in different areas of the state. The legislation requires the starting wage for a new job created through the project to be equal to or greater than the prevailing wage for that occupation in the local labor market area and ties the amount of a wage increase to the prevailing wage for an occupation in the local labor market. The department thinks that too much emphasis on high wage jobs could conflict with other program goals.

However, the department also recognizes that the program is intended to require employers to pay a living wage. Therefore, the department has added a revised definition of smart job back into §186.104 that includes the term "family-wage job" in order to reflect legislative intent to create higher-than-average wages through the program.

Comment: Add a sentence at the end of §186.308(a) to read, "a summary of contracts and contract amendments shall be submitted to the appropriate Local Workforce Development Board," in order to ensure that the Local Workforce Development Boards are aware of Smart Jobs Contracts in their Local Workforce Development Areas.

Response: The department does not agree with the comment. The department has acquired a mailing list of local board contacts and intends to keep the local boards informed of pending applications and applications approved for their areas. However, the department wants to maintain flexibility in administering the program and thinks an additional rule requiring submission of contracts and contract amendments is unnecessary, adds bureaucracy, and is not consistent with the legislative intent to streamline the program.

The department received three comments about the rules generally:

Comment: Adopt a rule that would prohibit the use of Smart Jobs dollars for projects that involve intra-state job transfers. This would prevent the program from using state tax dollars to shift jobs around the State. The department could permit intra-state job movement by waiver.

Response: The department does not agree with the comment. The department's practice has been not to approve the use of the smart jobs fund program to assist a business in moving from one part of the state to another. In effect, a longstanding policy exists that state level incentives should not be used for intra-state competition. The department would not approve a smart jobs grant award if the grant was a determining factor in whether or not to transfer employees to another part of the State.

The department recognizes, however, that a situation might arise in which transferring employees would be permissible under the program. For example, the department would consider awarding a smart jobs fund grant to an employer who wished to expand into an enterprise zone or a defense readjustment zone. Rather than add a rule that could be waived to address a situation that has not arisen, the department prefers to maintain the flexibility to address such situations, if and when they arise, on a case-by-case basis.

Comment: The department should reserve a portion of the Smart Jobs Funds appropriated for the 1997-98 biennium for use for certain targeted training projects. Examples could include projects that create or retain high wage jobs and projects undertaken in enterprise zones or defense readjustment zones. The reserve could also be used to create a rainy day fund for use in case of an economic downturn.

Response: The department does not agree with the comment. The department recognizes that it might be wise to establish a rainy day fund; however, the legislature increased the funding of the Smart Jobs program to provide more funding for job training. The department intends to be judicious and prudent with fund administration. The eligibility requirements and funding priorities required by law serve as controls over fund administration that ensure appropriate distribution of program dollars.

Comment: Maintain or reduce current levels of administrative spending on Smart Jobs.

Response: The department does not agree with the comment. As noted in the response to the comment on §186.302(f)(3)(E), above, the department intends to minimize administration costs by streamlining the application process. In addition, the department has no additional full-time employees to commit to program administration.

However, in order to comply with legislative intent, the department must attempt to allocate 50% of available program dollars to small businesses during the next fiscal year. Based on current appropriation levels and historical averages, the department estimates 1200 small business participants in the program during the next fiscal year, compared to 60 small business participants during the fiscal year ending August 31, 1997.

Finally, the department notes that the statute authorizing the Smart Jobs Fund Program caps expenditures for program administration at 5.0% of the total funds deposited in the smart jobs fund in that year.

Comments were received from the office of Senator David Sibley, the Houston-Galveston Area Council, and the Texas Economic Development Council, Inc.

The amendments are adopted under the authority of Texas Government Code, §§481.153 and 481.0044(a), which require the Texas Department of Commerce to adopt rules to implement the Smart Jobs Fund program, and the Administrative Procedure Act, Texas Government Code, Chapter 2001, Subchapter B, Rulemaking, with prescribes the standards for agency rulemaking.

Texas Government Code, Chapter 481, Subchapter J, is affected by the amended rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711327
W. Lane Lanford
Chief Administrative Officer
Texas Department of Commerce
Effective date: September 15, 1997
Proposal publication date: June 20, 1997
For further information, please call: (512) 936–0181

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Chapter 187. Capital Access Program

10 TAC §§187.1-187.18

The Texas Department of Commerce, on behalf of the Texas Department of Economic Development, adopts new §§187.1-187.18 implementing the Capital Access Program enacted by the 75th Legislature in Senate Bill (SB) 266 through the addition of Texas Government Code, Chapter 481, Subchapter BB. Sections 187.2, 187.3, 187.8, 187.13, and 187.16 are adopted with changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6533). Sections 187.1, 187.4-187.7, 187.9-187.12, 187.14, and 187.15 are adopted without changes to the proposed text and will not be republished.

The Capital Access Program was created by the 75th Legislature to provide access to capital for small and medium-sized businesses and nonprofit organizations that may otherwise fall outside conventional lending guidelines. Special consideration is given to small or medium-sized businesses and nonprofit organizations that are either located in an established enterprise zone or operate or propose to operate a day-care center or group day-care home.

Section 187.1 sets forth the authority to administer the program and the program's purpose.

Section 187.2 sets forth the definitions of commonly used terms associated with the program. Comments received during the public comment period suggested that the department make the partial enrollment of loans more explicit. As a result, the department has added language to the definition of a capital access loan to address partial enrollment. In order to further clarify that partial enrollments are permissible under the program, a definition of partial enrollment has been added to §187.2.

Section 187.3 establishes eligible uses and costs for loans received under the program and sets forth restricted uses of capital access loan proceeds. Loans considered ineligible for enrollment in the program include construction or purchase of residential housing, simple real estate investments, excluding that occupied by the applicant's business, refinancing of existing loans not originally enrolled under the program, and inside bank transactions as defined in §187.2. During the public comment period, a comment suggested that the department allow for a separate legal entity to own real estate as long as the business being financed occupies 51% of the usable space and guarantees the loan. In addition, comments suggested that the rules explicitly allow for the enrollment of loans that have been refinanced from other institutions. As a result, language has been added to this section to allow for the use of a separate real estate owning entity and the refinancing of loans from other institutions.

Section 187.4 sets forth provisions previously unmentioned relating to capital access loans, allows for consortium participation in the program, restricts the sale of program loans on the secondary market, limits the liability of the state to reserve proceeds only, allows for loans enrolled under the program to be refinanced, allows loans not originally enrolled in the program to be partially enrolled if refinanced in an amount that exceeds the original loan amount, and establishes that the participating institution, not the department, shall determine such aspects as the recipient of a loan, the amount of a loan, and the interest rate of a loan enrolled under the program.

Section 187.5 sets forth the parameters for reserve contributions and renewals of lines of credit to be used under the program.

Section 187.6 sets forth the application procedure for financial institutions to become eligible to participate in the program and sets forth the items to be included in the participation agreement.

Section 187.7 describes the process through which eligible applicants may obtain capital access loans.

Section 187.8 sets forth how loans made by participating financial institutions are enrolled into the program and describes the information required on the enrollment form. Language in §187.8(c)(7) was changed in response to comments received during the public comment period to request a description of "use of loan proceeds" rather than "project description." In addition, new §187.8(d) was added, stating that lenders need only rely on the truthfulness of borrowers statements provided on the enrollment form, and subsequent sections were relettered accordingly.

Section 187.9 outlines the procedure for the review of enrollment form information and program fund availability by the department.

Section 187.10 sets forth the purpose of the reserve account, where the reserve shall reside and in what type of an account the reserve will be held.

Section 187.11 describes how each party involved in the capital access loan transaction contributes to the reserve account and provides for an increase in contributions by the department

when the business or nonprofit organization is located in an enterprise zone or is a child-care provider.

Section 187.12 sets forth the limits on the department's contribution to a financial institution's reserve. The department's maximum reserve contribution is $35,000 on each capital access loan with no one applicant receiving more than $150,000 during a three year period.

Section 187.13 sets forth the provisions and process for withdrawals made by financial institutions from their established capital access reserves. It also provides details of the claim form and that the department may reject a claim due to misleading or false information or because the financial institution's records do not substantiate the claim. In response to comments received, the department has added language to §187.13(b), to allow lenders additional flexibility with respect to pursuit of collection of charged-off loans. The department also added new §187.13(e), stating that partially enrolled loan amounts and enrolled loans sharing collateral or guarantees will be subordinated to unenrolled portions and loans for purposes of claim subsequent to charge-off. Language was also added at §187.13(g)(6), to provide for the allowance of claims to be delayed in an effort to recover additional loan proceeds. Subsequent subsections within §187.13 were relettered and renumbered accordingly.

Section 187.14 establishes that all money and interest accrued in a reserve account under the program is property of the state, allows for withdrawals by the state from reserve accounts that exceed 33% of the financial institution's outstanding capital access loan balance, and allows complete withdrawal of reserves from institutions whose participation agreement has lapsed where the institutions have no outstanding capital access loans and have not made a loan under the program within 24 months.

Section 187.15 sets forth that the state's liability under the program is limited to the proceeds within the financial institution's established reserve.

Section 187.16 details the annual reporting requirement from participating financial institutions to the department. In response to comments, the department added language stating that additional information required in reports will be consistent with the objectives of the program. The department has deleted language requiring information regarding the type and size of businesses and nonprofit organizations with capital access loans and language requiring gender and ethnicity information.

Section 187.17 provides the name, address, and telephone number for the division within the department that should be addressed concerning the Capital Access Program.

Section 187.18 allows the executive director or governing board of the department to waive any provision in the rules not statutorily imposed upon a showing of good cause.

The department received comments regarding the proposed rules, which are summarized, with the department's responses, as follows:

Comment: The permissibility of partial enrollments (when less than 100% of a loan is enrolled in the program) should be made more explicit. Although partial enrollments are clearly implied in several place in the proposed rules, the rules should explicitly mention and partial enrollments.

Response: The department agrees with the comment. The department has added language to §187.2, of this title, Definitions, so that the definition of a capital access loan specifically includes partial enrollments.

Comment: More precise language should be added to §187.3(c)(2), Eligible and Restricted Uses of Capital Access Loans, pertaining to occupancy requirements. A small or medium-sized business might occupy 51% or more of commercial space, but its owners may form a real estate owning entity to be the legal owner of the property, which leases back to the operating business. To more precisely address such situations, the rules should adopt the U.S. Small Business Administration's (SBA) approach to such alter ego financing. The SBA requires that the operating business occupy at least 51% of the usable space and that the operating company and its principals guarantee the loan that has been made to the real estate owning entity.

Response: The department agrees with the comment. Language has been added to §187.3(c)(2) to more precisely address occupancy requirements and to allow for a separate legal entity to own real estate as long as the business being financed occupies 51% of the usable space and guarantees the loan.

Comment: While it is entirely and appropriately clear that a lender cannot refinance its own pre-existing debt under the program (unless there is new money lent, in which case only the new money can be enrolled), the program is silent on whether one bank refinancing another bank's debt constitutes a prohibited use of the program. The language of §187.3(c)(3), Eligible and Restricted Uses of Capital Access Loans, should explicitly allow for the enrollment of loans that have been refinanced from other institutions.

Response: The department agrees with the comment. Language has been added to §187.3(c)(3) to explicitly provide that taking over or refinancing the indebtedness of eligible borrowers held at unrelated financial institutions will be eligible to be enrolled in the program.

Comment: Add language to §187.4(d), Other Provisions Relating to Capital Access Loans, to state that where the amount of a loan that is refinanced exceeds the original amount and the excess is not enrolled in the program, the refinanced loan will be a partial enrollment and by definition, less than 100% enrolled.

Response: The department agrees in part and does not agree in part with the comment. The language of §187.4(d) currently states that additional reserve contributions can be made on the amount of the loan as refinanced that exceeds the original loan amount. The subsection does not mandate that the excess portion be enrolled. The loan will then be termed a partial enrollment. However, in order to clarify that partial enrollments are permissible under the program, a definition of partial enrollment has been added to §187.2.

Comment: In §187.8(c), Enrollment of Loans into the Program, add the word "reasonably" to state that the enrollment form shall include certain enumerated information, "as well as

such information as the department may *reasonably* require." In §187.8(c)(7), change the phrase "project description" to "use of loan proceeds." Research the ethnicity and gender requirement under §187.8(c)(10) to determine if it is permitted under Regulation B of the federal banking rules. Add language following §187.8(c)(16) stating that financial institutions may rely on the truthfulness of certain representations made by borrowers.

Response: The department agrees in part and disagrees in part with the comment. The department does not agree with the suggestion to add the qualifier "reasonably" to describe additional information the department may require on its enrollment form, because the department thinks the language could open the provision to subjective interpretation regarding what information the department may request. The department has no intention, and does not anticipate that it will have any need, to request information that is not essential to the program's integrity. The department agrees that the suggested language, "use of loan proceeds" is more precise than "project description," and has substituted the suggested language in §187.8(c)(7).

Further, Regulation B of the federal banking rules (12 CFR 202.5) does not compel a rule change, and the department has not changed proposed §187.8(c)(10), which includes the ethnicity and gender of borrower as information the department may require. Regulation B, §202.5-Rules Concerning Taking of Applications, provides for an exception to the general prohibition on asking for such information where it is required by state regulation.

Finally, the department agrees with the comment requesting the addition of language following §187.8(c)(16), stating that financial institutions may rely on the truthfulness of certain representations made by borrowers on the enrollment form, and has added the suggested language.

Comment: Add language at §187.13(b), Withdrawals from Reserves by Participating Institutions, to give lenders flexibility in the timing of processing claims for reimbursement.

Response: The department agrees with the comment in part and disagrees in part. While the department agrees to allow for additional out-of-pocket expenses as necessary for further collection, we believe that the accrued interest on the charged-off loan should be capped at 180 days subsequent to charge-off. The placement of interest accrual restrictions is necessary to discourage protracted collection efforts. The program wishes to encourage lenders to continue collection efforts if further collection can be reasonably expected; thus, the 180 interest accrual allowance is deemed essential. Therefore, the language suggested by the comment has been added, along with additional language capping the accrual of interest on the charged off loans.

Comment: Expand §187.13(d) to detail that partially enrolled loan amounts and enrolled loans sharing collateral or guarantees shall be subordinated to unenrolled portions and loans.

Response: The department agrees with the comment. The department added language providing that enrolled portions of loans will be subordinated to unenrolled portions.

Comment: Modify §187.13(f) to allow for a notification of charge-off within 30 days but with a request to delay reimbursement until a later time.

Response: The department agrees with the comment. Language was added at §187.13(g)(6) to allow a financial institution to indicate on the claim form whether it intends to claim against reserves as outlined on the form or continue collection efforts and submit a claim at a later date.

Comment: Add a standard of reasonableness to describe the additional information the department can require in annual reports from lenders. Address the requirement that financial institutions include a breakdown of ethnicity and gender of eligible borrowers.

Response: The department agrees with the comment. Section 187.16(4) and (5), requiring this information, has been deleted from the final rule.

Comments were received from Wells Fargo Bank and Small Business United of Texas.

The rules are proposed under the authority of Texas Government Code, §§481.0044(a) and 481.406, which direct the department to adopt and enforce necessary rules for the administration of the program and the Administrative Procedure Act, Government Code, Chapter 2001, Subchapter B, Rulemaking, which sets forth the process to be followed by state agencies in proposing and adopting rules.

Texas Government Code, Chapter 481, Subchapter BB, is affected by these rules.

§187.2. Definitions.

The following words and terms, when used in this section, shall have the following meanings, unless the context indicates otherwise.

Capital access loan–A loan, or portion of a loan, that is entitled to be secured by the fund.

Child-care provider–A small or medium size business or a nonprofit organization that operates or proposes to operate a day-care center or group day-care home, as those terms are defined by Human Resources Code, §42.002.

Department–The Texas Department of Economic Development or any successor agency.

Eligible applicant–A small or medium size business or nonprofit organization.

Enrollment form–A form remitted to the department, by a participating financial institution, subsequent to loan funding by the financial institution, to receive the state's contribution to the institution's reserve account.

Enterprise Zone–A geographic area designated by a city or county, through an application to the department, as economically distressed pursuant to Chapter 2303, Texas Government Code.

Financial institution–A bank, trust company, banking association, savings and loan association, mortgage company, investment bank, credit union, or nontraditional financial institution.

Fund–The capital access fund.

Governing Board–The governing board of the department.

Inside bank transactions–Loans to insiders of the financial institution as defined by federal laws and regulations concerning insider transactions including the Financial Institutions Regulatory and Interest Rate Control Act of 1978, as amended, and applicable implement-

ing regulations; the 1982 Banking Act, as amended, and applicable implementing regulations and the Financial Institutions Reform, Recovery and Enforcement Act of 1989, as amended, and applicable implementing regulations.

Loan–Includes a line of credit and must meet the requirements of Government Code, §481.405(e).

Medium business–A corporation, partnership, sole proprietorship, or other legal entity that:

(A) is domiciled in this state or has at least 51% of its employees located in this state;

(B) is formed to make a profit;

(C) is independently owned and operated; and

(D) employs 100 or more but fewer than 500 full-time employees.

Money market fund–An open-ended management investment company regulated under the Investment Company Act of 1940, as amended, which values its securities pursuant to §270, 2a-7 of Title 17 of the Code of Federal Regulations.

Nonprofit organization–A private, nonprofit, tax-exempt corporation, association, or organization listed in §501(c)(3), Internal Revenue Code of 1986, that is domiciled in this state or has at least 51% of its members located in this state.

Partial enrollment–A loan which is not 100% enrolled into the program.

Participation agreement–The agreement between the financial institution and the department which allows the financial institution to participate in the program.

Participating financial institution–A financial institution participating in the program, after entering into a participation agreement with the department.

Program–The capital access program.

Reserve account–An account established at a participating institution on approval of the department in which the money is deposited to serve as a source of additional revenue to reimburse the financial institution for losses on loans enrolled in the program.

Small business–A corporation, partnership, sole proprietorship, or other legal entity that:

(A) is domiciled in this state or has at least 51% of its employees located in this state;

(B) is formed to make a profit;

(C) is independently owned and operated; and

(D) employs fewer than 100 full-time employees.

§187.3. Eligible and Restricted Uses of Capital Access Loans.

(a) To qualify as a capital access loan, a loan must be made to a small or medium size business or to a nonprofit organization and be used by the business or nonprofit organization for any project, activity, or enterprise in this state that is in furtherance of economic development.

(b) The eligible applicant must apply the capital access loan to working capital or to the purchase, construction, or lease of capital assets, including buildings and equipment used by the business or nonprofit organization. Working capital uses include the cost of exporting, accounts receivable, payroll, inventory, and other financing needs of the business or organization.

(c) A loan is not eligible to be enrolled under this subchapter for:

(1) construction or purchase of residential housing;

(2) simple real estate investments, excluding the development or improvement of commercial real estate occupied by the applicant's business or organization. The purchase or development of commercial real estate will be considered a "simple real estate investment" unless the eligible borrower occupies at least 51% of the usable space of the property being financed. Should the owners of the eligible business wish the commercial real estate to be owned by a separate legal entity, such ownership structure will be allowed so long as the eligible business occupies 51% of the usable space and the eligible business guarantees the real estate loan.

(3) refinancing of existing loans not originally enrolled under, Chapter 481, Government Code, Subchapter BB. Taking over or refinancing the indebtedness of eligible borrowers held at unrelated financial institutions will not be defined as refinancing under this section; or

(4) inside bank transactions.

§187.8. Enrollment of Loans into the Program.

(a) Reserve deposits will not be remitted by the department to the reserve account of participating financial institution until the receipt of an enrollment form by the institution.

(b) An enrollment form shall be sent to the department within 15 days of loan origination. Origination is considered to be the earlier of the date the loan documents have been executed or the date the loan proceeds are first forwarded to the eligible borrower.

(c) The enrollment form submitted by participating institutions, developed by the department, shall include at least the following information as well as other information the department may require;

(1) name, address, phone and contact of the participating financial institution;

(2) name, address, phone and contact of the eligible borrower;

(3) certification that to the best of the participating institution's knowledge the borrower is eligible under program guidelines;

(4) the total loan amount being made by the financial institution to the borrower;

(5) the amount of the loan being enrolled in the program;

(6) business description;

(7) description of use of loan proceeds;

(8) employment information of the eligible borrower;

(9) gross sales of the eligible borrower for the past twelve months;

(10) ethnicity and gender of borrower;

(11) whether borrower is a certified State of Texas historically underutilized business;

(12) if applicable, verification of status as a project within an enterprise zone, or for day-care center or group day-care home;

(13) amount of participating financial institution's deposit to reserve;

(14) amount of eligible borrower's deposit to reserve;

(15) calculation of the department's contribution to reserve;

(16) execution of the certification on behalf of the participating financial institution by an authorized officer, which shall include the officer's name, title and the date of execution.

(d) Execution of the enrollment form shall imply that all information provided on this form is true and correct, and that the lender is relying on the representation of the borrower for the following numbered items of the enrollment form: (2),(3),(6),(7),(8),(9),(10),(11), and (12).

(e) The department, may, but is not required, to notify participating financial institutions when proceeds available in the fund soon may not be sufficient to meet the demand for reserve contributions.

(f) If proceeds within the fund are insufficient to provide reserve contributions to participating financial institutions, those institutions may still enroll loans without the additional state contribution, subject to normal enrollment guidelines.

§187.13. Withdrawals from Reserves by Participating Institutions.

(a) In the event a loan enrolled under this program is charged-off, the participating financial institution may withdraw from its established reserve account an amount necessary to cover the anticipated loss.

(b) A participating financial institution may withdraw from its established reserve immediately subsequent to loan charge-off, or the institution may choose to attempt further collection proceedings before withdrawal. So long as the lender has notified the department of the charge-off of an enrolled loan within the allowed 30 day time frame and the reserves are adequate to cover the charge-off at the time of notification, the lender shall not be limited to how long they may delay a claim for reimbursement. However, accrual of interest on charged-off loans will only be allowed for a time period of 180 days subsequent to charge-off. Recovery of all other expenses, as is reasonable and necessary, shall be allowed to be recovered by the lending institution through its established reserve account.

(c) Only non-recoverable losses, plus reasonable and customary expenses may be removed from the reserve account. Money taken in excess of this amount must be returned immediately to the reserve account.

(d) The reserve account shall be used by the financial institution only to cover any losses arising from a charge-off of a capital access loan, or that portion of a partially enrolled loan that is enrolled under the program, made by the financial institution.

(e) Partially enrolled loan amounts and enrolled loans sharing collateral or guarantees shall be subordinated to unenrolled portions and loans for purposes of claim subsequent to charge-off.

(f) The financial institution shall maintain records substantiating the non-recoverable losses, plus reasonable and necessary expenses, for 12 months following withdrawal from the program.

(g) A claim form, signed and dated by an authorized officer of the financial institution, must be remitted to the department detailing the charged-off program loan within 30 days of the charge-off. Claim forms will contain the following information:

(1) borrower's name;

(2) loan number used by the bank to identify the loan;

(3) date of charge-off;

(4) amount of claim, broken down to include:

(A) customer principal;

(B) accrued/ unpaid interest;

(C) out-of-pocket expenses; and

(D) total claim amount.

(5) statement of intent by the financial institution concerning its continued efforts to recover the charged-off loan;

(6) statement of intent by the financial institution on whether to claim against the reserves as outlined on the form submitted or to continue collection efforts and pay claim at a later date.

(7) authorized signature, title, date and phone number of officer of the submitting financial institution.

(h) The department may reject a claim when the representations and warranties provided by the participating financial institution at the time of enrollment have been determined to be misleading or false or if the records of the financial institution do not substantiate the claim.

§187.16. Annual Reporting and Auditing Requirements.

A participating financial institution shall remit an annual report to the department containing the information required by Chapter 481, Subchapter BB, §481.411. The report must:

(1) provide information with regard to outstanding capital access loans, capital access loan losses, and any other information consistent with the objectives of the program the department considers appropriate;

(2) state the total amount of loans for which the department has made a contribution from the fund under the program; and

(3) include a copy of the institution's most recent financial statement.

(4) include information regarding the type and size of businesses and nonprofit organizations with capital access loans; and

(5) provide a breakdown of the ethnicity and gender of eligible applicants enrolled in the program during the year being reported.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711324
W. Lane Lanford
Chief Administrative Officer
Texas Department of Commerce

Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 936–0181

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TITLE 13. CULTURAL RESOURCES

Part III. Texas Commission on the Arts

Chapter 31. Agency Procedures

13 TAC §31.10

The Texas Commission on the Arts adopts by reference an amendment to §31.10, concerning the application forms and instructions for the Financial Assistance Application Form, without changes to the proposed text as published in the July 25, 1997, issue of the *Texas Register* (22 TexReg 6911).

The section was amended in order to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended September 1997.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711244
John Paul Batiste
Executive Director
Texas Commission on the Arts
Effective date: September 15,1997
Proposal publication date: July 25, 1997
For further information, please call: (512) 463–5535

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Chapter 35. Texas Arts Plan

13 TAC §35.1

The Texas Commission on the Arts adopts by reference an amendment to §35.1, concerning the Texas Arts Plan, which outlines the activities of the Commission, without changes to the proposed text as published in July 25, 1997, issue of the *Texas Register* (22 TexReg 6911).

The section was amended in order to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended September 1997.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711243
John Paul Batiste
Executive Director
Texas Commission on the Arts
Effective date: September 15, 1997
Proposal publication date: July 25, 1997
For further information, please call: (512) 463–5535

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Chapter 37. Application Forms and Instructions for Financial Assistance

13 TAC §§37.23, 37.24, 37.26,

The Texas Commission on the Arts adopts by reference amendments to §§37.23, 37.24, and 37.26, concerning the application forms and instructions for the Arts in Education Program - Sponsors, the Texas Touring Arts Program - Company/Artist, and Texas Touring Arts Program - Sponsors, without changes to the proposed text as published in the July 25, 1997, issue of the *Texas Register* (22 TexReg 6911). However, Form IV, which is adopted by reference in §37.24 and §37.26 is adopted with a date change from February 16 to February 17. February 16 is a holiday, therefore, the Texas Commission on the Arts extended the deadline date to February 17. The language contained in §37.24 and §37.26 is not being changed from the proposal.

The amendments are being adopted in order to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended September 1997.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711242
John Paul Batiste
Executive Director
Texas Commission on the Arts
Effective date: September 15, 1997
Proposal publication date: July 25, 1997
For further information, please call: (512) 463–5535

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TITLE 16. ECONOMIC REGULATION

Part I. Railroad Commission of Texas

Chapter 3. Oil and Gas Division

Conservation Rules and Regulations

16 TAC §3.37

The Railroad Commission of Texas adopts an amendment to §3.37, regarding well spacing, with changes to the proposed text as published in the April 25, 1997, issue of the *Texas Register* (22 TexReg 3696). The amendment is adopted to remove an unnecessary regulatory burden associated with well spacing exceptions by reducing the class of persons presumed to be affected by an exception application. Only if a mineral interest owner's property is closer to an applied-for "exception" location than it would be to a "regular" location (for which no notice is required), is that person presumed to be affected.

The commission has made changes to the amendments as proposed. The changes are in subsection (a)(2)(A) and (B) and clarify that mineral interest owners of offset tracts that are within the distance of potential drainage implied by either the lease-line or between-well spacing rules are given notice of an exception application.

The following is a summary of comments received:

BMNW Resources, LLC and North Texas Oil & Gas Association (NTOGA) filed comments supporting the amendments.

Edward J. Carpenter (Carpenter) filed comments supporting the amendments but suggested expanding the class of persons presumptively affected to include the owners of offset leased mineral interests, i.e., lessor/royalty owners and nonoperating lessees. The commission declines to make these changes because royalty owners (who do not own a possessory interest) and nonoperating mineral interest owners are considered, by virtue of their contracts or leases, to be represented by the designated operator of the tract. Carpenter also suggested that the provision of the rule specifying the minimum notice be extended to 20 days instead of 10 days. The commission declines to make this change. The time period is the minimum required and does not preclude longer notice. The commission rarely gives less than 21 days' notice under the current rule. Furthermore, a party that is prejudiced by too little notice may request a continuance. Not changing the rule gives the commission the flexibility to use the shorter notice period if warranted.

Union Pacific Resources Company filed comments generally supporting the amendments but seeking additional changes that: (1) purport to determine the class of affected persons, (2) require notice to only those offset interests closer than the minimum lease-line spacing instead of half the between-well spacing, (3) define "reasonable compliance" mathematically, and (4) adopt clerical procedures for submission of information. The commission declines to make the first change for the following reasons. It is well recognized law that all persons whose property rights are, or may be, affected by an administrative determination are entitled to notice and an opportunity to participate in the decision process. The commission cannot, in a rule of general applicability, determine all affected persons when application of the general rule encompasses innumerable fact situations involving surface ownership, severed or divided mineral ownership, cotenancy, heterogeneous geology, etc. The confluence of these and many unmentioned parameters often create unique situations which cannot be known to the commission and which may, and will, cause the class of affected persons to vary. To attempt to limit the class of affected persons in a rule would be a disservice to the industry because it would give a false sense of security to those persons who relied on the rule to limit notice. Such reliance, in the face of a judicial challenge in which an unnoticed person was shown to be affected, would not prevent revocation of the permit irrespective of the permittee's detrimental reliance.

The commission agrees that the issues raised in (2) warrant change from the published language. This issue is addressed below in conjunction with other commenters' suggestions on the same subject.

The commission declines to make the third change which relates to the level of exactitude required when drilling a well at a particular permitted location. This issue is better addressed in Statewide Rule 11 (16 T.A.C. §3.11) which requires wells generally be drilled vertically, rather than in the rule being amended. The commenter suggests that a well drilled within 10% of its permitted location be deemed in compliance with its permit. The commission declines to make this change because it would substitute a mathematic calculation for a multivariable, reasoned determination. For instance, a well permitted 1867 feet from a lease line that is drilled through many faults and steeply dipping strata to a low permeability reservoir at 20,000 feet depth may be considered to be in compliance if it is within 20% (i.e., 1493.6 feet or further from the lease line). However, a well permitted as a Rule 37 exception location 50 feet from a lease line that is drilled through horizontal strata to a high permeability reservoir at a 2000-foot depth may not be considered reasonable in compliance if it bottoms 45 feet from the lease line. Even if the commission considers a well to be drilled in compliance with its permit and requires nothing more from an operator, some third party with knowledge not available to the commission, may seek to prove, after notice and hearing, that a drilled well was not drilled in reasonable compliance with its permit. It would unduly prejudice such a person to have a rule precluding such an action. The commission deems it necessary to have the flexibility to consider all variables in making such a determination.

The fourth recommendation requiring an applicant to supply address labels or a diskette in ASCII format, relates to internal clerical procedures and should not be made part of this rule. Furthermore, requiring operators to file either labels or computer diskette would prejudice small operators without the necessary manpower (and knowledge of ASCII formatting) or equipment. The commission believes this should best be left as an option and not a rule requirement.

Texas Mid-Continent Oil & Gas Association (TMOGA) filed comments generally supporting the amendments but suggesting changes that (1) purport to determine the class of affected persons, and (2) require notice to only those offset interests closer than the minimum between-well spacing instead of half the between-well spacing. For the reasons stated above, the

commission declines to attempt to limit the class of affected persons by rule.

The distance within which offset mineral interest owners are presumed to be affected persons was the subject of two comments: one commenter sought a change that would, in many cases, decrease this distance and one sought a change that would increase it. The required between-well distance and the required lease-line offset are related to the anticipated drainage area of a well and to the latitude required for locating wells (to avoid surface obstructions, etc.). In the absence of special field rules, the statewide spacing distances are 467 feet lease-line offset and 1200 feet between-well spacing. Presumably, the 1200-foot between-well spacing (which connotes a well draining at least 600 feet) is larger than the 467-foot lease-line offset requirement to allow greater flexibility in wellsite selection in undeveloped or sparsely developed areas and to allow drainage in the "corners" of tracts. Rules for specific fields are determined after the requesting operator presents data on the local geology that substantiate the appropriateness of spacing requirements that differ from the statewide requirements. The stated purpose of the proposed amendment is to exclude from rule-required notice those persons who would be as, or more, likely to be affected by a regularly located well as they would be by an applied-for exception well. Requiring notice to offset tracts within the between-well spacing requirements would, in some cases, result in notice of an exception application being required to an offset tract that would be more affected by a regularly located well. If regularly located wells will adversely affect offset tracts, then the proper remedy is to amend the field rules. With that in mind, the distance in question must be related to the anticipated drainage for the target field. If half of the between-well spacing is greater than the lease-line spacing, then it must control because it contemplates, at least, the possibility of the greater drainage distance. The reverse is also true and the rule has been changed from the published version to require notice to offsets within the greater of the lease-line or half the between- well spacing. While this change is slightly more burdensome than the proposed text, it does not enlarge the class of persons who must comply with the rule and it significantly reduces the burden of complying with the rule as currently written. Additionally the preamble of the proposed rule stated:

Those persons who would be more or equally affected by a regularly permitted well will not be presumed to be affected by an exception application. The correlative rights of persons potentially more or equally affected by a regularly located well as by an exception location are presumed to be protected by the spacing rule and therefore do not fall into the presumed affected class.

As explained above, the referenced correlative rights protection from regularly permitted wells subsumes both the between-well distance and lease-line spacing.

The amendment is adopted pursuant to the Texas Natural Resources Code §§81.051, 81.052, 85.201 - 85.202, 86.041 and 86.042, which authorize the commission to adopt rules for the following purposes: to govern and regulate persons and their operations under the jurisdiction of the commission; to issue permits for oil and gas wells and to prevent waste and prevent injury to adjoining property.

The Texas Natural Resources Code, §§81.051, 81.052, 85.201 - 85.202, 86.041 and 86.042 are affected by the amendments.

§3.37. Statewide Spacing Rule.

(a) Distance requirements.

(1) (No change.)

(2) When an exception to this section is desired, application shall be made by filing the proper fee as provided in §3.76 of this title (relating to Fees Required To Be Filed) and the appropriate form according to the instructions on the form, accompanied by a plat as described in subsection (c) of this section. A person acquainted with the facts pertinent to the application shall certify that all facts stated in it are true and within the knowledge of that person and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required date.

(A) When an exception to only the minimum lease-line spacing requirement is desired, the applicant shall file a list of the mailing addresses of all affected persons, who, for tracts closer to the well than the greater of one-half of the prescribed minimum between-well spacing distance or the minimum lease-line spacing distance, include:

(i) the designated operator;

(ii) all lessees of record for tracts that have no designated operator; and

(iii) all owners of record of unleased mineral interests.

(B) When an exception to the minimum between-well spacing requirement of this section is desired, the applicant is required to file the mailing addresses of those persons identified in subparagraph (A)(i) - (iii) of this paragraph for each adjacent tract and each tract nearer to the well than the greater of one-half the prescribed minimum between-well spacing distance or the minimum lease-line spacing.

(3) (No change.)

(b)-(m) (No change.)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711318
Mary Ross McDonald
Deputy General Counsel, Office of General Counsel
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Effective date: September 15, 1997
Proposal publication date: April 25, 1997
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16 TAC §3.101

The Railroad Commission of Texas adopts an amendment to §3.101, concerning certification for severance tax exemption or reduction for certain high-cost natural gas, with changes to the proposed text as published in the March 21, 1997, issue of the *Texas Register* (22 TexReg 2948). The amendment is adopted in response to House Bill 398, 74th Legislature, 1995,

which provides that producers of natural gas may receive, upon certification by the Railroad Commission that the gas is high-cost, either a severance tax exemption or severance tax reduction. The amendment also clarifies and refines the application procedure and the criteria for obtaining high-cost certification. Since publication of proposed §3.101 on March 21, 1997, the 75th Legislature enacted, and the Governor signed, Senate Bill 862, which provides that an application for certification of gas as high-cost by the commission may be made at any time after the first day of production. Senate Bill 862 becomes effective on September 1, 1997. Therefore, §3.101 will be adopted to incorporate this most recent legislature enactment without further publication, because it does not enlarge the scope of those persons affected by the rule and lessens the burden on the regulated industry. Further, the adopted rule will be made effective on the same date Senate Bill 862 becomes effective, September 1, 1997.

Adoption of this section will effectuate the actions of the 74th and 75th Legislatures. In addition, the amended section will provide a more consistent approach to review of applications for high-cost gas certification and will result in more efficient processing of such applications.

All groups and associations making comments favored adoption of the proposed section. The comments recommended changes to the text of the published section.

Several commenters objected to specific language in the definition of "data-point well" and requested that the words "pre-stimulation" be added to the definition and to subsection (e)(5)(G). The commission agrees that the proposed changes are necessary to make the definition of "data-point well" consistent with use of the term elsewhere in the section and to clarify that only pre-stimulation flow rates should be considered.

Several commenters suggested the language in subsection (d)(1) be made more specific. The commission agrees and has clarified that any additional information requested will be for the purpose of clarifying, explaining, and supporting the required attachments.

Several commenters objected to identification of and elimination from area designation those drilling or proration unit areas surrounding data-point wells whose permeabilities and flow rates are equal to or greater than the limits listed in the section. The commission agrees. Subsections (e)(5)(C), (f)(3)(A)(i) and (g)(3) have been appropriately amended while subsection (g)(4) has been deleted.

Several commenters objected to the definition of "first day of production." The commission disagrees. The definition is consistent with 34 Texas Administrative Code §3.21, Natural Gas Production Tax (a Comptroller of Public Accounts rule). In addition, the deliverability test (Form G-10) referenced in the definition requires that a flowline/salesline be in place; therefore, the potential for a substantial lapse of time between the deliverability test and the first month of production does not exist.

Two commenters request that the term "drilling unit" be defined. The commission disagrees that the term needs to be defined in this section. Such definition is outside the scope of notice of the proposed section. The meaning of the term is self- evident and has been used in the commission's statewide rules without confusion to mean the area enclosed within the boundaries of the plat attached to the drilling application (Form W-1). If the term is to be defined, the definition should be placed in 16 Texas Administrative Code §3.69 where pervasive terms found throughout the rules are defined.

Two commenters suggested that redundant language in subsection (f)(3)(A)(i) be deleted. The commission agrees. A well that has been tested or completed in the proposed interval had to penetrate it. Therefore, the phrase "...tested, or are currently completed in" has been deleted.

One commenter requested a clarification of the phrase "in and around" in subsection (f)(3)(A)(i). No change was made in response to this comment, because if the formation extends beyond the "requested area" referenced in the subsection, the map, also referenced, should outline no more than the requested area.

The same commenter requested that the Director of the Oil and Gas Division be given authority to approve administratively individual well certification applications. Subsection (g)(2), as published, already gives the Director this authority. Therefore, no change was made in regard to this comment.

Another commenter suggested that because subsection (e)(5)(C) does not require the application for a new well producing inside the tight formation designated area to include test results or other data showing permeability and flow-rate values, the commission should clarify whether such requirement exists. The commenter would be correct to assume that because the subsection prescribes no such requirement, none exists.

The same commenter requested that the commission clarify when an explanation of failure to provide permeability data under subsection (f)(3)(B)(i) is required for those wells that have been tested and/or completed in the proposed tight formation area. The commenter also requested that the commission require an explanation only in those cases for which no data is available. The commission declines to change the subsection in response to this comment. As subsection (f)(3)(B)(i) states, an explanation is required only when no permeability data has been provided for wells tested and/or completed in the proposed tight formation area. The commission considers an explanation to be most critical in those cases when no permeability data has been provided but may be available.

One commenter expressed concern that under the language of subsection (e), paragraphs (1)(B), (2)(B), (3)(B), (4)(B), (5)(B) and (6)(B), the commission could impose burdensome filing requirements that would delay an individual well certification. The commenter suggests providing only copies of the G-1 forms filed for an individual well. The commission declines to change the section in response to this comment. What the commenter proposes is what the section now requires, i.e., only copies of all G-1 forms ever filed for the well for which the operator seeks certification.

The same commenter objected to the provision in subsection (g)(3) whereby an operator must request a hearing to have the application for a tight formation area designation considered, if it is found to be incomplete, or indicates the area does not qualify, or if a protest is filed. The concern is that

virtually all applications could be brought to hearing before being approved, even though only minimal additional explanations are necessary. The commission declines to change the section in response to this comment. Hearings on incomplete applications will be held only after relevant data supporting the application have been requested by the staff and have not been provided within a reasonable time, the application has been dismissed, and the applicant requests the hearing.

The same commenter expressed concern that subsection (h) requires all revenue interest owners to individually apply for the tax exemption or reduction. No change to the proposed subsection has been made in response to this comment. Subsection (h) is included merely to inform operators of certain of the Comptroller's procedures for making application. The commission has no authority to determine who may or may not file with the Comptroller.

One commenter requested that the commission broaden the definition of high-cost gas to include gas produced under such conditions as the commission determines to present extraordinary risks or costs. No change is made to the definition in response to this comment. When §201.057 of the Tax Code was enacted in order to provide a tax exemption for high-cost gas, the Texas Legislature incorporated the definition of high-cost gas found in 15 U.S.C. §3317. The Legislature specifically limited the definition of high-cost gas to that contained in §3317(c) as of January 1, 1989. The Legislature did not give the commission authority to expand the definition. The federal law referenced by the Legislature gave the Federal Energy Regulatory Commission (not state agencies) the discretion to define additional categories of high-cost gas.

One commenter requested that an "abbreviated" procedure be adopted for approving an application for an "extension" to a designated area when a well is drilled outside the designated area but within 2 1/2 miles of a previously approved designated area boundary. No change is made in response to this comment. Subsection (f) as published already addresses the situation described. If a new well is drilled outside an approved designated area, an application for a newly designated area must be filed. Because of the new area's proximity to the approved designated area, reference may be made to the already approved area's docket/order. However, the new area application will require the same basic information specified in the section.

The following groups or associations commented and supported adoption of the rule with changes: North Texas Oil & Gas Association, Mobil Exploration & Producing U.S. Inc., Shell Western E & P Inc., Amoco Exploration and Production, and Texas Mid-Continent Oil & Gas Association. There were no comments opposing the proposed rule.

The amendment is adopted pursuant to the Texas Natural Resources Code, §81.052, which authorizes the commission to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the commission, and pursuant to the Tax Code, §201.057, which gives the commission authority to require an applicant for high-cost gas certification to provide to it any relevant information necessary to administer the section.

§3.101. Certification for Severance Tax Exemption or Reduction for Gas Produced from High-Cost Gas Wells.

(a) Purpose. To provide a procedure by which an operator can obtain a Railroad Commission of Texas certification that natural gas from a particular gas well qualifies as high-cost natural gas under the Texas Tax Code, Chapter 201, Subchapter B, §201.057(a)(2)(A) and that such gas is exempt from or eligible for a reduction of the severance tax imposed by the Texas Tax Code, Chapter 201.

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1)-(4) (No change.)

(5) Data-point well–A well that has been tested and/or produced in the proposed tight gas formation; and, from the test results or other data, applicant provides a measured or calculated *in situ* permeability and/or a measured or calculated pre-stimulation stabilized flow rate against atmospheric pressure.

(6) Director–The director of the Oil and Gas Division or the director's delegate. Any authority given to the director in this section is also retained by the commission. Any action taken by the director pursuant to this section is subject to review by the commission.

(7) First day of production–The first day of the month following the earlier of the month of the deliverability test as reported on the commission designated form or the production month as indicated on the first production report filed showing a gas disposition code other than "lease or field fuel use" or "vented or flared."

(8) High-cost gas–Natural gas which the commission finds to be:

(A) produced from any gas well, if production is from a completion which is located at a depth of more than 15,000 feet;

(B) produced from geopressured brine;

(C) occluded natural gas produced from coal seams;

(D) produced from Devonian shale; or

(E) produced from designated tight formations or produced as a result of production enhancement work.

(9) Operator–The person responsible for the actual physical operation of a gas well.

(10) Spud date–The date of commencement of drilling operations, as shown on commission records.

(c) Applicability.

(1) A severance tax exemption is available for high- cost gas produced from a well that is spudded or completed between May 24, 1989, and September 1, 1996. Eligible high-cost gas will be exempt from the tax imposed by the Texas Tax Code, Chapter 201, during the period from September 1, 1991, through August 31, 2001.

(2) A severance tax reduction is available for high-cost gas produced from a well that is spudded or completed after August 31, 1996, and before September 1, 2002. Eligible high-cost gas will be entitled to a reduction of the tax imposed by the Texas Tax Code, Chapter 201, for the first 120 consecutive calendar months beginning on the first day of production or until the cumulative value of the tax reduction equals 50 percent of the drilling and completion costs

incurred for the well, whichever occurs first. The amount of tax reduction is determined pursuant to the Texas Tax Code, Chapter 201, Subchapter B, §201.057(c) .

(3) The plug back or deepening of an existing wellbore qualifies as a completion under this section. When the plug back or deepening is completed prior to September 1, 1996, the gas produced may qualify for a tax exemption. When the plug back or deepening is completed after August 31, 1996, the gas produced may qualify for a tax reduction. The plug back or deepening qualifies as a completion if:

(A) it is the initial completion in a commission-designated or newly discovered field that has not been previously produced from that wellbore; or

(B) the operator can demonstrate that the strata between the former completion and the new completion contain a minimum of 20 vertical feet of impermeable strata; or

(C) the operator submits the results of bottom hole pressure surveys, gas analyses or other methods or calculations comparing the new completion with previous completions in the wellbore that were in existence prior to May 24, 1989. The application shall include an explanation of the engineering principles, calculations, and reasoning to show that the gas to be produced from the applied-for completion could not have been produced from any completion in existence prior to May 24, 1989.

(4) If the operator determines that a gas well previously certified as producing high-cost gas no longer produces high-cost gas or if the operator takes any action or discovers any information that affects the eligibility of gas for an exemption or tax reduction under Texas Tax Code, §201.057, the operator must notify the commission in writing within 30 days after such an event occurs.

(5) If the commission determines that a gas well previously certified as producing high-cost gas no longer produces high-cost gas or if the commission takes any action or discovers any information that affects the eligibility of gas for an exemption or tax reduction under Texas Tax Code, §201.057, the commission will notify within 48 hours, in writing, the comptroller and the operator.

(d) Application procedure.

(1) An application for a state severance tax exemption or tax reduction for a gas well may be made only by the operator of that well. The operator shall file one copy of the required application form, one copy of the required attachments specified in subsection (e)(1)-(6) of this section and any additional information deemed necessary by the commission to clarify, explain and support the required attachments. Submission of legible copies of required attachments will comply if the application includes a statement, signed by the operator, that the attachments are true and correct copies of the documents originally filed with the commission. However, the commission may require an operator to file certified copies of required attachments or other documents from commission files if necessary for a certification.

(2) (No change.)

(e) Application requirements for individual well certifications. To qualify for the severance tax exemption or tax reduction, the operator must prove that the gas produced is high-cost gas by providing the following information:

(1) Applications for wells producing deep high-cost gas shall include:

(A) (No change.)

(B) copies of all Gas Well Back Pressure Test, Completion or Recompletion Reports and Logs ever filed on the subject well.

(2) Applications for wells producing geopressured brine shall include:

(A) (No change.)

(B) copies of all Gas Well Back Pressure Test, Completion or Recompletion Reports and Logs ever filed on the subject well;

(C)-(D) (No change.)

(3) Applications for wells producing coal seam gas shall include:

(A) (No change.)

(B) copies of all Gas Well Back Pressure Test, Completion or Recompletion Reports and Logs ever filed on the subject well if the gas is produced through a wellbore, or a detailed description of the production process if the gas is not produced through a wellbore;

(C) (No change.)

(D) evidence to establish that the natural gas was produced from coal seams.

(4) Applications for wells producing Devonian shale gas shall include:

(A) (No change.)

(B) copies of all Gas Well Back Pressure Test, Completion or Recompletion Reports and Logs ever filed on the subject well;

(C)-(F) (No change.)

(5) Applications for wells producing designated tight formation gas shall include:

(A) (No change.)

(B) copies of all Gas Well Back Pressure Test, Completion or Recompletion Reports and Logs ever filed on the subject well;

(C) specific reference to the commission docket number assigned to the applicable designated tight formation area certification along with a copy of the map with the subject well location shown, which outlines the designated tight formation area approved by the commission.

(6) Applications for wells producing production enhancement gas shall include:

(A) (No change.)

(B) copies of all Gas Well Back Pressure Test, Completion or Recompletion Reports and Logs ever filed on the subject well;

(C) -(I) (No change.)

(f) Application requirements for tight formation area certifications.

(1) If justification for an individual well application is based on a tight formation certification and the well is not located within a geographical area that has been previously certified as a designated tight formation area or the well is not completed in a formation interval that has been previously certified as a designated tight formation by the Federal Energy Regulatory Commission under the Natural Gas Policy Act or by the Railroad Commission of Texas, the operator must first apply for a tight formation area designation.

(2) An applicant requesting a tight formation area designation must submit a written request to the High-Cost Gas Severance Tax Section, at the address given in subsection (d)(2) of this section, for a certification that a named formation or a specific portion thereof is a tight formation. The applicant must supply a list of the names and addresses of all affected persons. For purposes of this subsection, "affected persons" means all operators of all wells listed on the current proration schedule for the applicable field or fields located within the proposed designated area. The applicant shall mail or deliver a copy of the prescribed, completed notice of application form to all affected persons, and if required, shall publish the notice of application in accordance with 16 Texas Administrative Code §1.46 of this title (relating to notice by publication in oil and gas and surface mining and reclamation nonrulemaking proceedings), as found in the commission's General Rules of Practice and Procedure (16 Texas Administrative Code, Chapter 1). Notice of application forms may be obtained by contacting the Railroad Commission of Texas, P. O. Box 12967, Austin, Texas 78711-2967, Attention: High-Cost Severance Tax Section. Before the application may be approved, the applicant shall submit a letter certifying that all affected persons were sent a copy of the notice of application, and the date on which the notice of application was sent.

(3) In addition to the written request and list of affected persons, the applicant must submit the following information in duplicate:

(A) a geographical and geological description of the formation, including:

(i) a map with an outline of the geographical limits of the formation in and around the requested area, with the proposed designated areal boundaries shown, with counties, surveys and abstracts identified and with the locations clearly identified for all wells inside the requested area that have penetrated the proposed formation; all wells (i.e. those that penetrated the proposed formation) shown on the map inside the requested area shall include either the commission's gas well identification number or the API number (if available);

(ii) a list of the counties involved, abstract numbers, survey names, geologic formation markers, and any other descriptive information that will aid in identifying the subject formation including an estimate of the number of acres within the requested area; and

(iii) a structure map contoured on the top of the formation and a cross-section to depict upper and lower limits of the proposed formation, or specific portion thereof.

(B) engineering and geological exhibits, including a written explanation of each, to establish the following:

(i) that the *in situ* permeability throughout the proposed formation or specific portion thereof is 0.1 millidarcies or less, as determined by geometric mean or median analysis of available data from all wells that either have been tested or are completed in the proposed formation within the requested area. If no *in situ* permeability estimates are provided for wells that are in the requested area and have been tested and/or are completed in the proposed formation, an explanation must be provided;

(ii) that the pre-stimulation stabilized production rate against atmospheric pressure at the wellhead, as determined by a geometric mean or median analysis of available data from all wells within the requested area that either have been tested and/or are completed in the proposed formation or specific portion thereof, does not exceed the production rate listed in the following table:
Figure: 16 TAC 3.101(f)(3)(B)(ii)

(iii) that no well drilled into the formation is expected to produce, without stimulation, more than five barrels of crude oil per day; and,

(iv) that the requested designated area does not extend beyond a two and one-half (2 1/2) mile radius drawn from any data point well.

(g) Commission action on applications for individual well certifications and for tight formation area designations.

(1) Each application, for an individual well certification, will be assigned a docket number identifying it as a severance tax application. A notice of receipt will be sent to the applicant, indicating the assigned docket number and receipt date. All further correspondence shall include this docket number.

(2) The director may administratively approve the individual well certification applications if the forms and information submitted by the operator establish that the gas qualifies as high-cost gas eligible for the severance tax exemption or tax reduction. If the director denies administrative approval, the applicant shall have the right to a hearing.

(3) If commission staff finds that the data submitted with the tight formation area designation applications are complete and comply with the requirements set out in subsection (f)(3) of this section and if no protest to the application is filed within 21 days of the notice, the application will be presented to the commission for approval. If commission staff finds the data submitted are incomplete, or indicate the area does not qualify, or if a protest is filed within the 21-day notice period, the applicant must request a hearing to have the application considered. If the applicant does not request such a hearing or if the applicant fails to appear at a requested hearing, the application shall be dismissed. Any such hearing shall be held only after at least 10 days' notice by the commission to all affected persons as defined in subsection (f)(2) of this section. If no protestant appears at the hearing, and/or if the application and any evidence presented at the hearing establishes that the subject formation meets the requirements for a tight formation certification, the application shall be presented to the commission for approval.

(h) Reporting. To qualify for the exemption or tax reduction provided by Texas Tax Code, §201.057(a)(2)(A), all persons responsible for paying the tax must apply with the comptroller after receiving a copy of the commission's certification letter. The application shall contain the commission's letter certifying that the well produces or will produce high-cost gas, a completed copy of the commission's

application for certification form and a completed copy of the applicable Comptroller of Public Accounts' form. To obtain the maximum tax exemption or tax reduction, the application must be filed with the comptroller at the later of the 180th day after the first day of production or the 45th day after the certification by the commission. If the application is not filed by the applicable deadline, the tax exemption or reduction will be reduced by 10% for the period beginning on the 180th day after the first day of production and ending on the date on which the application is filed with the comptroller.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711320
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Effective date: September 15, 1997
Proposal publication date: March 21, 1997
For further information, please call: (512) 463-7008

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Chapter 9. Liquefied Petroleum Gas Division

Subchapter A. General Applicability and Requirements

16 TAC §§9.2, 9.4, 9.5, 9.6

The Railroad Commission of Texas adopts amendments to §§9.2, 9.4, 9.5, and 9.6, relating to definitions; categories of licenses and related fees; licensing requirements; and examination requirements and renewal of certified status, without changes to the proposed text as published in the July 15, 1997, *Texas Register* (22 TexReg 6539). The Commission adopts the amendments to implement Senate Bill 634 (S.B. 634) enacted by the 75th legislature and effective September 1, 1997. The bill creates new LP-gas license Category P for portable cylinder exchange, as well as adds the alternative for self-insurance for LP-gas licensees; rules relating to the self-insurance provision will be proposed in a separate rulemaking.

The adopted amendment to §9.2 adds the definition for "portable cylinder," as defined in S.B. 634. In §9.4, the original and renewal fees for a Category P license are added to Table 1, and new subsection (d)(16) is added to describe the Category P license. Other amendments adopted in subsection (d),(6), (9) and (10), show the separation between cylinder filling activities (permitted by Category F, I, and J licenses) and cylinder exchange only (permitted by new Category P). New subsection (e) specifies that existing licenses including cylinder exchange activities will be converted to a new Category P license upon the next renewal date.

In §9.5, the only adopted amendment is the addition of Category P to those licenses listed in subsection (i)(3) which states attendance at a course of instruction is not required for company representatives and supervisors.

Section 9.6(a)(1) includes the adopted addition of a sentence clarifying that management-level examinations are offered for all categories of licenses. The new table shows the addition of a column for Category P in the list of licenses, but the corresponding rows in the Category P column are left blank because no employee-level examinations are offered for Category P. Another sentence is added to §9.6(a)(4) to indicate that the back of LPG Form 16 includes a study guide for the examinations.

In addition, §9.6(f) is amended to indicate that the requalification seminars, previously suspended until February 28, 1998, in an earlier rulemaking (adopted in the May 10, 1996, issue of the *Texas Register* at page 4014) are permanently suspended, and to add the requirement that applicants must comply with other applicable Commission rules regarding training.

The Commission received no comments concerning the proposal.

The amendments are adopted under the Texas Natural Resources Code, §113.051, which authorizes the Commission to adopt rules relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public.

Texas Natural Resources Code, §113.051, is affected by the adopted amendments.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711321
Mary Ross McDonald
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Railroad Commission of Texas
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 463-7008

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Part II. Public Utility Commission of Texas

Chapter 23. Substantive Rules

Subchapter

Customer Service and Protection

16 TAC §§23.40, 23.42, 23.43, 23.45, 23.46

The Public Utility Commission of Texas (commission) adopts new §23.40, relating to Prepaid Local Telecommunications Service (PLTS), and adopts amendments to §23.42 relating to Refusal of Service, §23.43 relating to Applicant and Customer Deposit, §23.45 relating to Billing and §23.46 relating to Discontinuance of Service with changes to the texts as published in the April 11, 1997, issue of the *Texas Register* (22 TexReg 3358).

The new rule, §23.40, requires dominant certificated telecommunications utilities (DCTUs) to provide prepaid local telecommunications service to eligible customers as a one-time alternative to disconnection for nonpayment of services. The new rule

defines terms, sets forth notification requirements and accounting practices, and establishes deadlines and procedures necessary to implement the requirements of the rule. The amendments to §§23.42, 23.43, 23.45, and 23.46 seek to make these rules consistent with new §23.40.

The public benefit anticipated by implementation of this rule is enhancement of universal access to basic local service by limiting the ability of DCTUs to refuse to provide basic local service to customers for nonpayment of charges incurred for services other than basic local service.

To meet these objectives, the rule provides that customers who would be otherwise disconnected for nonpayment of charges may subscribe to a prepaid local only service. Such a customer will have access to local services on a prepaid basis but will be prohibited from incurring usage-sensitive charges, such as toll charges, that would increase the customer's debt to the DCTU and/or other carriers.

Workshops were held on January 10, 1997 and March 4, 1997 prior to publication of the proposed rule. The following parties filed initial comments in response to the proposed rule published in the April 11, 1997 issue of the *Texas Register* (22 TexReg 3358): AT&T Communications of the Southwest, Inc. (AT&T); jointly filed comments of Center of Economic Justice and Consumers Union (CEJ/CU); jointly filed comments by Choctaw Communications, E.Z. Talk, L.C., Fast Connections, Inc., Metroconnection, Inc. and U.S. Telco, Inc. (collectively referred to as "Choctaw"); Dell Telephone Cooperative; La Ward Telephone Exchange, Inc.; Ganado Telephone Company; Fort Bend Telephone Company (Fort Bend); GTE Southwest Incorporated (GTE-SW); MCI Telecommunications Corporation (MCI); Southwestern Bell Telephone Company (SWBT); United Telephone Company of Texas, Inc. and Central Telephone Company of Texas (collectively referred to as Sprint), Texas Association of Long Distance Telephone Companies (TEXALTEL); Texas Statewide Telephone Cooperative, Inc. (TSTCI); and the Texas Telephone Association (TTA). Reply comments were filed by AT&T, GTE-SW, SWBT, TEXALTEL, and TSTCI.

A public hearing was held on May 22, 1997. GTE-SW, TSTCI, CEJ, and SWBT offered oral comments which have been summarized to the extent they vary from the written comments.

Most commenters recommended changes to specific provisions of the rule. CEJ/CU was strongly in favor of adoption of the proposed rule and amendments. AT&T, and SWBT offered conditional support. Choctaw, GTE-SW, TSTCI, TEXALTEL, MCI, TTA, and Sprint opposed the adoption of the PLTS rule. Dell Telephone Cooperative, La Ward Telephone Exchange, Inc., Ganado Telephone Company, and Fort Bend Telephone Company expressed concerns about the cost incurred by compliance with this rule. As a result of the comments received during the comment period and at the public hearing, certain revisions have been made to the proposed rule. Discussion of the comments will refer to the sections of the rule as published in the *Texas Register*.

The commission invited parties to identify benefits of the proposed rule. MCI and Choctaw commented that there are no significant benefits resulting from PLTS. AT&T commented that the benefits of the proposed rule could not be substantiated with detailed documentation and supporting workpapers. AT&T stated that it is difficult to measure the level of demand for PLTS because no person has presented any demand projections for the proposed PLTS service. Nevertheless, AT&T suggested that unquantifiable benefits associated with PLTS service should not be ignored. SWBT commented that the benefits of the proposed rules which create a service that is unique in the nation are hard to measure in monetary terms but arise more from the fact that customers may be able to remain on the network for basic service at affordable rates which is consistent with the overarching principle of universal service.

CEJ/CU opined that the proposed rule is a "textbook example of good regulation." CEJ/CU commented that the rule assures the availability of a basic necessity to consumers with little or no competitive power, benefits all consumers by moving closer to the goal of universal service, and eliminates an unfair advantage to DCTUs in the competitive billing and collection market. CEJ/CU suggested that the proposed rule benefits those who are currently without service and those who are in danger of losing service, but it also benefits current subscribers and society as a whole. CEJ/CU contended that basic local telephone service is a necessity for daily life and that the current rules conflict with the universal service goals and make DCTUs more attractive as billing and collection entities. CEJ/CU concluded that the proposed rule correctly breaks the link between two different services: basic local telecommunications and long distance services. CEJ/CU asserted that the proposed rule correctly distinguishes debt for basic local telecommunications service from all other charges.

As previously stated, the commission anticipates that the benefits from the adoption of this rule will include the enhancement of universal service. By allowing customers who are capable and willing to pay for local services to receive such service, the number of Texans who have access to local service should increase. The commission recognizes that the PLTS plan is intended to be restrictive. The rule minimizes the impact on uncollectibles of telecommunication carriers by blocking access to toll and other discretionary services and by not diminishing the incentive for PLTS customers to make payments on past due charges for toll and services, other than basic local service, before the customer may access such services.

The commission invited parties to submit information, that could be substantiated with detailed documentation and supporting workpapers, relating to the anticipated economic costs to parties who are required to comply with the proposed sections of the rules.

In its comments, SWBT stated that it has not completed its cost analysis. SWBT offered that it knows that the following functional areas will be impacted by the proposed rule language: Customer Record Information System (CRIS), service order rating, reconciliation, CASH and adjustments, treatment, usage, billing, journals, uncollectibles, taxes, tables, bill format, special programs, and conversions. SWBT stated that its preliminary estimate of person days to implement PLTS is approximately 795 person days for information services and approximately 300 person days for finance.

GTE-SW filed its calculations concerning its systems development costs in complying with the proposed rule. In its initial comments, it estimated that compliance would cost approxi-

mately $2.8 million dollars. In its reply comments, GTE-SW estimated an additional $600,000 for training and personnel costs would be incurred. These costs take into account the estimated impact on GTE-SW's billing and processing systems, as well as GTE-SW's operations. GTE-SW further estimated that the proposed rule will have economic costs of $115,000 associated with the training of customer contact representatives; economic costs of $5,175 associated with training credit management personnel to handle the outstanding balances; economic costs of $6,075 for training personnel in the Off-line Contact Center. In addition, GTE-SW estimated that its ongoing annual labor costs will increase by $500,000 to handle the increased customer contact associated with complying with the proposed rules. GTE-SW questioned how DCTUs that have elected under incentive regulation would recover costs associated with PLTS. GTE-SW also raised the issue that DCTUs should receive reimbursement of implementation costs from the state universal service fund. SWBT also commented that the Federal Communications Commission's (FCC's) universal service order, unlike the proposed rule, provides a cost-recovery mechanism. AT&T objected to the recovery of PLTS-related costs through the state universal service fund.

Dell Telephone Cooperative, Inc., and La Ward Telephone Exchange, Inc. did not specifically determine their costs but commented that the implementation of the proposed rule would be extremely expensive and burdensome. While Ganado Telephone, Inc. did not substantiate its economic costs with work papers, it estimated that its costs would be at a minimum, $100,000, the costs associated with a billing system modification to manage voluntary toll limits. Sprint did not substantiate its associated costs to implement this rule; however, it estimated that its costs would be $108,026 per year. This estimate did not include any billing system programming that it believed would be needed and will prove to be the greatest cost of implementation.

The commission notes that DCTUs will not be required to implement this rule until the first quarter of 1998, at the earliest. All DCTUs may pursue cost recovery through rate case filings pursuant to the Public Utility Regulatory Act of 1995 (PURA95) and commission rules. In cases where the DCTU has elected under Subtitle H in September 1995, the DCTU can apply for a rate increase in September 1999 under PURA95. The commission finds that the interim period between implementation of this rule and September 1999 will be necessary to develop a test year to demonstrate cost associated with compliance with this rule.

The commission asked for cost justification in this rulemaking both to verify the existence of costs and to judge the rule's projected benefits in light of the estimated costs. GTE-SW, the only carrier to provide cost justification, suggests that the rule specify that such costs be recovered by DCTUs through the universal service fund. The commission rejects GTE-SW's suggestion that DCTUs should be allowed to recover costs from the state universal service fund in light of our determination that DCTUs can apply for cost recovery through a rate case filing.

Staff noted at the May 22, 1997 public hearing that compliance with the FCC's Report and Order 96-45, paragraphs 384-402, would require companies that receive universal service support to incur administrative costs and upgrade existing billing systems and switches, by January 1, 1998, in order to provide services to low income consumers. SWBT, TSTCI and AT&T commented that it was not appropriate to compare the costs of implementing PLTS with the cost of implementing the FCC's order because the FCC's order only applies to Lifeline customers while the proposed rule applies to any customer who is faced with disconnection for nonpayment of charges.

The commission concludes that cost estimates relating to modifications of billing systems and switch upgrades may include costs that are likely to be incurred through compliance with the FCC's Order 96-45 and therefore are not attributable to the requirements of this rule.

TTA concluded that the proposed rule imposes substantial costs in terms of employee time and associated costs in modifying information systems, billing and collection systems, and providing the notices required by the rule. According to TTA, a DCTU will be required to establish procedures to query and track throughout its customer base and former records for those customers that meet the consumer profile of an eligible PLTS customer, as well as those customers who are ineligible for PLTS. TTA asserted that the proposed rule appears to override or even ignore the current "hands on" informal collection practices followed by many small incumbent local exchange carriers (ILECs). Lastly, TTA argued that the proposed rule subjects small ILECs to high compliance costs relative to the small proportion of the customer base to be served under PLTS offerings. Dell Telephone Cooperative, Inc., La Ward Telephone Exchange, Inc. and Ganado Telephone Company also commented that they work closely with their customers when there are payment problems.

The commission disagrees with TTA's general analysis of the proposed rule. The notice requirements in the rule are necessary to inform customers of the PLTS option as an alternative to disconnection for nonpayment of charges other than charges for basic local service. The proposed rule neither overrides nor ignores the "hands on" and informal collection practices implemented by many DCTUs. On the contrary, to the extent that such a collection practice can alleviate the need to suspend or disconnect a customer, customers will not have the need to subscribe to PLTS. Finally, concerning TTA's comment that the implementation costs outweigh the benefits to be received by PLTS customer, the commission disagrees. This rule provides a compromise position that only narrowly impacts a DCTU's disconnection practices while expanding access to local telephone services.

AT&T did not quantify the effect of the proposed rule on it but maintained that the commission should be aware that there are costs involved with PLTS that are not directly tied to "implementation of the proposed new section and amendments." AT&T stated that its failure to substantiate such costs with detailed documentation does not mean that such implementation costs can be ignored.

MCI anticipated that it will incur indirect costs in the form of uncollectibles. Although MCI did not substantiate its costs with supporting workpapers, it noted that it had estimated costs in Project Number 12334, Amendment of Substantive Rule §23.46, Discontinuance of Service, Regarding Disconnection of Local Telephone Service, ranging from $134 million to

$179 million and suggested that the potential costs of $179 million, the bulk of which is increased uncollectibles revenue for both local exchange carriers (LECs) and interexchange carriers (IXCs), will be borne by other rate payers at a cost of approximately $1.48 per access line per month. MCI estimated that its direct costs of implementing the toll block and voluntary limit system for PLTS would be $53 million.

The commission rejects MCI's and AT&T's argument regarding increases in uncollectibles and implementation costs as a result of this rule. As a threshold matter, the commission does not find the cost estimates provided in Project Number 12334 to be persuasive because the rule is far narrower that the proposed rule in Project Number 12334. The commission notes that other states have found that even if substantial increases in uncollectible expenses are, in fact, one predictable result of policies limiting or prohibiting disconnection of local service for nonpayment of toll charges, such increases should be seen as part of the normal cost of doing business especially now that competition is burgeoning. In adopting this rule, the commission, at this time, strikes an appropriate balance between promoting universal service and minimizing IXC uncollectibles by not outright prohibiting disconnection for nonpayment of toll but creating PLTS as an alternative to disconnection. Furthermore the commission is of the opinion that such "potential uncollectibles" do not outweigh the public benefits that are envisioned to result from this rule. This rule is not intended to affect the DCTUs' or the IXCs' ability to take other measures to limit their exposure to uncollectibles such as conducting credit checks, establishing deposit practices, and pursuing other avenues to recover uncollectibles consistent with federal and state laws and regulations.

With respect to MCI's cost estimates related to the implementation of toll blocking technology, the commission finds that the proposed rule does not impose a requirement that IXCs implement toll blocking. However, to the extent that IXCs choose to implement toll blocking to limit their exposure to uncollectibles, that decision is a voluntary business decision.

Choctaw concluded that the costs associated with implementation of PLTS will be the loss of choice for consumers. Choctaw suggested that the loss of competition that will result from a mandated offering of PLTS will result in fewer choices of providers for Texas consumers.

The commission disagrees with Choctaw's assertion that PLTS will cause limited competition in the local exchange market. On the contrary, the commission believes that competition is likely to be enhanced because the provision of PLTS by DCTUs will encourage competitors to offer similar services at competitive prices to consumers. The commission notes that at present, the only option available to customers who have been disconnected or are at risk of disconnection of local service by the DCTU is to seek service from competitors of DCTUs.

At the May 22, 1997 public hearing, the staff also requested comments on whether any aspect of the proposed rule needs to be modified to reflect the provisions of the FCC's Report and Order 96-45. SWBT suggested that if the commission's concern in this area is limited to Lifeline consumers, then it should reevaluate the PLTS rule in light of this recent FCC development. AT&T offered that it may be appropriate to include a provision in the rule indicating that Lifeline customers may not be required to subscribe to PLTS in order to retain local service.

The commission disagrees with the suggestion of SWBT. The universal service concerns being addressed by this rule are not limited to Lifeline customers. Instead, the concern the commission addresses in this rule is ensuring that customers who are able and willing to pay for local services have an opportunity to receive such service. The commission notes that PLTS is available to all customers including Lifeline customers but no customer is required to subscribe to PLTS. DCTUs should inform Lifeline customers of all options to retain local service, including those consistent with the FCC's and commission's rules.

In the preamble to the proposed rule, the commission requested comments on whether the timing of customer notification about PLTS should occur before or after suspension of telephone service and whether the service restoral charge should be waived for PLTS customers as proposed under §23.40 subsections (d)(2)(H) and (f)(1)(C)(ii) in lieu of notifying customers of PLTS prior to suspension of their telephone service.

SWBT and AT&T supported the proposed rule on the issues of notice requirements and the deferral of service restoral charges. AT&T commented that the commission should avoid making all DCTUs rearrange their operations to conform to a single billing practice and thereby increase the costs of implementation. MCI recommended that DCTUs should provide notification to DCTU customers about PLTS in the manner that is most cost-efficient and is consistent with current notifications provided by the DCTU.

This rule properly balances the needs of the customer and the DCTU's need for flexibility. The rule sets forth those notification requirements that are necessary to inform customers of the existence of PLTS as well as the customer's rights and responsibilities when subscribing to PLTS. The commission notes that special customer notice is necessary for this service because it is available as a one-time option, has unique restrictions, and is subject to disconnection without notice. The rule provides flexibility in the delivery of notice by allowing for varied timing of notice depending on whether a particular DCTU suspends service for non-payment of charges before disconnecting service. The commission agrees with AT&T and notes that the notice requirements in the rule are to a large extent compatible with the current billing practices of the ILECs.

MCI suggested that if the DCTU provides a suspension notice, notice should be provided with such service suspension and if the DCTU provides notice of disconnection prior to disconnection, notice for PLTS should be provided with the disconnection notice. MCI did not support waiving service restoral charges because it would be discriminatory against customers of non-DCTUs who have to pay service restoral charges. MCI contended that if service restoral charges could be paid through the deferred payment plan under PLTS, it would minimize the financial burden on customers.

The commission disagrees with MCI's argument. Deferral of service restoral charges is appropriate when a customer does not receive direct notice of PLTS eligibility prior to suspension because the customer does not have the opportunity to avoid incurring the restoral charge. Since the customer has notice of PLTS eligibility after suspension from basic local service, the

customer should only be required to pay a restoral charge when that customer returns to basic local service.

TTA commented that customers should not be notified of PLTS prior to being suspended from service because suspension of service prior to disconnection is intended to give customers an opportunity to pay for services that the customer has received prior to disconnection of telephone service. TTA did not take a position on whether the service restoral charge should be temporarily waived in lieu of notification prior to suspension of service. Choctaw also argued that notice of PLTS should not be provided so long as customers have the opportunity to incur additional toll charges.

The rule meets TTA's and Choctaw's concerns. If a DCTU's standard practice is to suspend service for non-payment of charges before disconnection of service, the DCTU is not required to provide notice of PLTS until after suspension of service.

At the May 22, 1997 public hearing, the staff asked parties to comment on whether a DCTUs implementation of a toll limitation or credit management system should affect the timing of the notice of the availability of PLTS.

TSTCI was not clear about the staff's interpretation of "credit management system" and was unable to respond to this question.

SWBT noted that it does not believe that the notification provisions of PLTS in the proposed rule warrant modification. SWBT reiterated its position that the toll limitation collection tool and PLTS are separate matters. SWBT noted that the toll limitation tool would hopefully prevent customers from reaching the point of needing PLTS. SWBT concluded that both mechanisms should be able to operate independently to serve the common goal of helping keep customers on the network. AT&T stated that the commission's comments at the May 13, 1997 Open Meeting clearly indicate that issues concerning DCTUs' credit management systems and the issues involved in PLTS are not related. AT&T suggested that PLTS may be viewed as the "cure" to a customer's problems with high bills, but a credit management system is "preventive medicine" designed to avoid the occurrence of high bills in the first instance.

The commission agrees with AT&T and SWBT that a DCTU's implementation of a toll limitation or credit management system is compatible with the overall goals of PLTS and, therefore, should not affect the timing of the notice regarding availability of PLTS. The commission finds that the proposed rule appropriately permits notice of PLTS to occur after suspension or disconnection of service because the delay in notice would allow DCTUs greater leverage to collect delinquent payments owed by customers. The commission believes that any burden on a customer associated with temporary suspension or disconnection of service before a customer receives notice of the PLTS program are outweighed by the potential abuse of the system by consumers.

However, the commission notes that the rationale behind deferring service restoral charges when notice is delayed until after suspension is equally applicable to the deferral of service connection charges when notice is delayed until after disconnection. The commission, therefore, has addressed this issue by modifying proposed subsection (f)(1)(C)(i) {renumbered as subsection (f)(1)(B)(i)} as discussed in the commission response to comments concerning proposed subsection (d)(1)(B).

Proposed subsection (a) explained which LECs must comply with the rule.

The first sentence of proposed subsection (a) required all DCTUs to comply with the rule, unless specifically indicated otherwise. MCI requested that the words "unless specifically indicated otherwise" be deleted from proposed subsection (a) because such language could be read to imply that the proposed rule attempts to impose some obligations on non-DCTUs.

The commission disagrees with MCI's request. The words "unless specifically indicated otherwise" should not be read to imply that the rule imposes obligations on non- DCTUs. Instead, those words are used to note that the rule may not apply to all DCTUs, *e.g.*, a DCTU that obtains a waiver.

Proposed subsection (a) also prohibited a DCTU from refusing to provide PLTS to an applicant because the applicant is indebted to any DCTU or other telecommunications carrier for telecommunication services, including long distance services where the DCTU bills for such services pursuant to tariffs or contracts. MCI requested that this sentence be deleted because it disagrees with the premise of the rule, i.e., that a customer should have an opportunity to remain on the network on a local-only basis even if that customer does not agree to make payments on past due toll charges.

The commission disagrees with MCI's request because, as a condition of service, a customer who wishes to receive a local-only service should only be required to pay past due local charges of the type the customer will receive in the future. Companies may seek collection of past due debts in the same manner that companies seek collection in other industries.

TSTCI argued that proposed subsection (a) should create an exemption for small LECs so that the provisions of the rule would not apply to a LEC that serves less than 31,000 access lines or is a cooperative corporation. TSTCI pointed to individual company efforts to reduce disconnects from the network and the costs that would be incurred by small LECs if they are required to comply with the proposed rule. In its reply comments, AT&T agreed with TSTCI's proposed revision. AT&T argued that the high costs to small DCTUs associated with the implementation of the PLTS offering and the fact that there has not been a proliferation of new service providers offering local service at rates above the basic local service rates of the DCTUs in small LEC areas justified TSTCI's proposed limitation, at least for the near future.

The commission disagrees with the argument of TSTCI. Commission rules currently permit local exchange companies the remedy of disconnecting customers from local service for non-payment of other charges, including toll charges. The commission considered withdrawing the remedy; however, the commission determined that the prepaid local-only alternative is an appropriate compromise solution to promote universal service in all areas of this state without unduly exacerbating the impact on the telecommunication carriers.

Proposed subsection (b) set forth the definitions.

Proposed subsection (b)(3)(J) incorporated non-published service and non-listed service as services available to customers subscribing to PLTS. GTE-SW and MCI urged the deletion of proposed subsection (b)(3)(J). It is their position that since non-published service and non-listed service are discretionary services, these services should not be available to PLTS customers.

The commission disagrees with the suggestion of GTE-SW and MCI. Although as a general rule, PLTS customers will not have access to services other than basic local services, the commission finds that, for public safety concerns, an exception is warranted for non-published service and non-listed service. The commission notes that a PLTS customer who chooses to subscribe to such service would be required to pay under proposed subsection (f)(1)(A)(ii), as part of the customer's PLTS service, the tariffed rate for non-published service and non-listed service.

Proposed subsection (c) set forth the customer eligibility requirements.

Under proposed subsection (c)(1), former customers who would otherwise be refused service because of the existence of undisputed indebtedness to any DCTU or other telecommunications carrier, would be eligible to receive PLTS. CEJ/CU requested that the reference to "undisputed" indebtedness be deleted from proposed subsection (c)(1). It is their position that the word "undisputed" is unnecessary and creates ambiguity in the rule. SWBT agreed with CEJ/CU that the word "undisputed" should be deleted from the proposed subsection.

The commission agrees that the word "undisputed" should be deleted from proposed subsection (c)(1).

Under proposed subsection (c)(2), current residential customers who have received a notice following suspension or disconnection of service for non-payment for services are eligible to receive PLTS. CEJ/CU and Choctaw argued that customers who are disconnected are not current customers; rather they fall within the category of former customers. Therefore, they recommended that the words "or disconnection of service for non-payment for services" in proposed subsection (c)(2) be deleted. SWBT opposed the suggested deletion.

The commission agrees that subsection (c)(2) should be clarified. Therefore, to clarify the rule, the commission inserts the words "has not been disconnected from the network but who" before the word "has" and deletes the words "or disconnection" in subsection (c)(2).

Under proposed subsection (c)(3), an applicant who was previously disconnected from PLTS by a DCTU would not be eligible to receive PLTS from that DCTU again. MCI argued that PLTS should be available to the customer only once, as opposed to being a one-time option with a particular DCTU. It recommended that the phrase "from that DCTU" be deleted. CEJ/CU, on the other hand, recommended the deletion of proposed subsection (c)(3) for a different reason. They argued that a customer disconnected from PLTS for nonpayment, but who subsequently pays all outstanding basic local telecommunications service and PLTS debt, should be eligible for PLTS service again. SWBT opposed CEJ/CU's suggestions. It argued that the PLTS offering should be limited to a one-time option.

The commission disagrees with the suggestions offered by MCI and CEJ/CU. PLTS is intended to provide a one-time option from a particular DCTU for customers to promote universal service. It becomes the PLTS customer's responsibility to comply with the terms of PLTS. The DCTU should not be required to repeatedly offer PLTS to customers who do not carry out their responsibilities. However, other DCTUs are neither prohibited nor excused from offering PLTS to such customers.

Under its discussion regarding subsection (c)(3), MCI suggested that subsection (k) be modified to require DCTUs to identify former PLTS customers to any non-DCTU seeking information about such customer's credit status.

The commission disagrees with the suggestion of MCI. Notification to IXCs under subsection (k) is necessary to provide IXCs information necessary to block toll calls from PLTS customers at their switches. The commission rejects MCI's suggestion to extend notification requirements to any non-DCTU. The commission believes it would be inappropriate to expand the notification requirements to any non-DCTU beyond the purpose of IXCs limiting potential toll fraud.

MCI suggested that a new subsection (c)(4) be added to the rule to clarify that PLTS will not be available to business customers.

The commission does not believe that additional language is necessary to clarify that PLTS will not be available to business customers. However, to avoid any ambiguity in the rule, the commission adds the following language as new subsection (c)(4): "Business customers shall not be eligible for PLTS."

Proposed subsection (d) set forth customer notification requirements.

CEJ/CU argued that proposed subsections (d)(1)(B) and (f)(1)(C)(i) should be modified to either require notice of PLTS at least 10 days before disconnection of service or require waiver of the connection charges for those customers who apply for PLTS service within 30 days after disconnection. It argued that ideally consumers should receive notice of PLTS before suspension or notice. However, it noted that the proposed (d)(1)(A) allows DCTUs that suspend service to notify customers of the PLTS option after suspension but requires recovery of the service restoral charge to be deferred until the customer returns to basic local telecommunications service. CEJ/CU suggested that a similar deferral be permitted for the service connection charges to ensure that customers of DCTUs that disconnect service receive the same protections as customers of DCTUs that suspend service before disconnection. SWBT opposes waiving non-recurring service connection charges.

The commission has defined the terms "suspension of service", "disconnection of service", "service restoral charge", and "service connection charge" in subsection §23.40(b) relating to definitions. Service connection charges are those charges applied by the DCTU to connect service to a customer's telephone line after it has been disconnected by the DCTU. The service restoral charges are those charges applied by the DCTU to restore service to a customer's telephone line after it has been suspended by the DCTU.

The commission agrees with CEJ/CU. The commission has modified proposed subsection (f)(1)(C)(i) {renumbered as subsection (f)(1)(B)(i)} to permit a deferral of service connection charges if a customer subscribes to PLTS within a certain period. Specifically, if a DCTU does not suspend basic local service customers prior to disconnection, the customer should receive notice of the availability of PLTS after disconnection. Service connection charges should be deferred until the customer returns to basic local service if the customer promptly subscribes to PLTS. The commission has determined that a customer must subscribe to PLTS within 10 days from the date the DCTU mailed a termination notice containing notification of PLTS if the customer is to receive a deferral of service connection charges.

MCI suggested that the requirement in proposed subsection (d)(1)(B) that a DCTU notify a customer of the availability of PLTS within three days after the date of disconnection imposes an unwarranted expense on DCTUs given that DCTUs are required to educate customers of PLTS annually through bill inserts and the white pages directory. Instead, MCI recommended that this requirement be deleted and the burden placed on the eligible customer to contact the DCTU regarding PLTS.

The commission disagrees with MCI's suggestion. Rapid notification is necessary for the rule to meet the universal service goals of the commission. If a DCTU could delay notifying a customer of PLTS eligibility for an extended period of time after disconnection, the commission's attempt to enhance universal access to basic local telephone service would be frustrated.

MCI also recommended that if DCTUs are required to provide notice about the availability of PLTS in the notice of disconnection required by §23.46, DCTUs would not have to incur additional costs.

The commission agrees with MCI and notes that DCTUs that do not suspend service prior to disconnection are permitted, under the rule, to notify customers after disconnection of service rather than in the notice of disconnection in order to accommodate concerns that notification of PLTS in the disconnection notice would jeopardize the DCTU's current ability to collect delinquent payments owed by customers.

Proposed subsection (d)(2) set forth the content of the notice provided by a DCTU offering PLTS. The commission inserts subparagraph (B) in subsection (d)(2) for reasons described in the commission response to comments regarding proposed subsection (f)(1)(A). The remaining subparagraphs are, therefore, renumbered.

Proposed subsection (d)(2)(C) {renumbered as subsection (d)(2)(D)} required that the notice about PLTS include information about a customer's responsibility to make the initial deferred payment, in the third billing cycle and every month thereafter, for up to 12 months. CEJ/CU suggested that the words "if applicable," be inserted before the words "in the third billing cycle" in proposed subsection (d)(2)(C). SWBT did not object to this suggestion.

The commission agrees with the suggestion of CEJ/CU and inserts the words "if applicable," before the words "in the third billing cycle" in proposed subsection (d)(2)(C) {renumbered as subsection (d)(2)(D)}.

Proposed subsection (d)(2)(G) {renumbered as subsection (d)(2)(H)} limited PLTS, with some exceptions, to be a one-time option. CEJ/CU suggested that proposed subsection (d)(2)(G) be deleted. They argued that a customer disconnected from PLTS for nonpayment, but who subsequently pays all outstanding basic local telecommunications service and PLTS debt, should be eligible for PLTS service again. SWBT opposed such a deletion.

The commission disagrees with the suggestions of CEJ/CU. PLTS is intended to provide a one-time option from a particular DCTU for customers to promote universal service. It becomes the PLTS customer's responsibility to comply with the terms of PLTS. The DCTU should not be required to repeatedly offer PLTS to customers who do not meet their responsibilities.

GTE-SW, Choctaw, and MCI argued that proposed subsections (d)(2)(H) {renumbered as subsection (d)(2)(I)} and (f)(1)(C)(ii) {renumbered as subsection (f)(1)(B)(ii)}, relating to temporary waiver of service restoral charges, be deleted. GTE- SW and MCI note that the customer has ample opportunity to initiate discussions with the DCTU prior to suspension because the proposed rule provides for annual billing inserts and publication in the white pages. Therefore, GTE-SW and MCI concluded that customers should not receive a deferral of restoral charges when subscribing to PLTS. MCI and Choctaw argued that it is inappropriate to defer the restoral charge because such a deferral would give DCTUs an unfair competitive advantage. Specifically, Choctaw argued that competitive local exchange carriers (CLECs) wishing to provide service on a resale basis to a customer who has been suspended by a DCTU must issue an order of disconnect and pay the full nonrecurring charges for installation.

The commission disagrees with the arguments of GTE-SW, Choctaw, and MCI concerning the suspension of restoral charges when subscribing to PLTS. The commission believes that the proposed rule appropriately delayed notice requirements concerning PLTS until after a customer is suspended to prevent the customer from incurring a large toll debt prior to suspension of service. The customer therefore does not receive direct, imminent notice of PLTS until after suspension. But for the delay in notice, customers would have a greater opportunity to avoid restoral charges by subscribing to PLTS prior to suspension. Second, there is no discriminatory treatment between PLTS and customers receiving basic local services. Under the provisions of this rule, all suspended customers must pay restoral charges when they return to basic local telephone service. A customer subscribing to PLTS, however, does not return to basic local service until that customer is converted from PLTS to basic local service at a future date. The commission, however, modifies proposed subsection (d)(2)(H) {renumbered as subsection (d)(2)(I)} to reflect the requirements in subsection (f)(1)(C) {renumbered as subsection (f)(1)(B)} regarding deferral of non-recurring charges.

TSTCI contended that the notice requirements in the proposed rule, as a whole, are extensive and therefore burdensome for the DCTUs to comply with. Instead of requiring a DCTU to notify the customer of the options available to return to basic local

telecommunications service once the customer has met certain obligations, TSTCI suggested that such notice be included in the initial notice provided to customers regarding the PLTS plan. Specifically, TSTCI suggested that a new subparagraph (J) be added under proposed subsection (d)(2) to state that "The customers eligibility to return to basic local telecommunications service after satisfying requirements described in subsection (g)(1) of this section."

The commission disagrees with TSTCI's suggestion. As the party with greater resources and greater knowledge concerning commission rules and regulations, the DCTU should bear the responsibility to inform customers of their option to return to basic local service after the customer has met the necessary obligations required under the proposed rule.

Proposed subsection (e)(2) required a DCTU to mail confirmation letters to customers subscribing to PLTS. TSTCI noted that the confirmation letter contains the same information as the initial notice sent to customers about PLTS. TSTCI, therefore, suggested that instead of requiring DCTUs to provide a confirmation letter to a PLTS subscriber stating the customer's rights and responsibilities, proposed subsection (e)(2) should merely require that the DCTU inform the customer, upon enrollment into the PLTS plan, of the rights and responsibilities under PLTS and the rates, terms and condition of service under the PLTS plan as described in the initial notice previously sent to the customer.

The commission disagrees with the suggestion of TSTCI. Because PLTS is a one- time option for customers, it is necessary that customers receive sufficient notice of their rights and responsibilities. A standard confirmation letter from the DCTU to the subscribing PLTS customer demonstrates that PLTS customers are notified of their responsibilities and provides the DCTU with evidence that it has complied with the commission's rules.

Proposed subsection (f)(1) set forth the rates applicable to PLTS.

Proposed subsection (f)(1)(A)(ii) would allow a DCTU to charge a PLTS customer the tariffed rate for non-listed and non-published service, if the PLTS customer requests those services. GTE-SW expressed a concern that proposed subsection (f)(1)(A)(ii) is potentially inconsistent with proposed subsection (b)(3)(J) since non-listed and non- published service under proposed subsection (b)(3)(J) is listed as a mandatory service under proposed subsection (b)(3)(J) but proposed subsection (f)(1)(A)(ii) authorizes a separate charge for these services. GTE-SW recommended modifying proposed subsection (f)(1)(A)(ii) to authorize tariffed charges for other vertical local services, if applicable.

The commission believes this concern is not warranted. The commission notes that proposed subsection (b)(3)(J) was not intended to create a free offering of non-published and non-listed services to PLTS customers. Instead, the commission's intent was to create an exception for these services from the general rule that PLTS customers be prohibited from accessing vertical services. Proposed subsection (b)(3)(J) requires the DCTU to provide non-published and non-listed service to a PLTS customer who requests it and proposed subsection (f)(1)(A)(ii) states that the customer will be charged the rates listed in the DCTU's tariffs. The commission declines to adopt GTE-SW's recommendation because the rule creates an exception for non-published and non-listed services and is not intended to apply to all vertical services.

MCI suggested that proposed subsection (f)(1)(A) be clarified to state that the rates for PLTS include a charge for toll blocking.

The commission does not find it necessary to adopt MCI's suggestion. In proposed subsection (f)(1)(A), the commission authorizes DCTUs to charge PLTS customers for toll blocking. Specifically, the monthly rate for PLTS includes the residential tariffed rate (or Lifeline rates, if applicable) for services included in the definition of PLTS. Since toll blocking is a service included in PLTS, the DCTU is allowed to charge the PLTS customer the tariffed rate for toll blocking. The commission, however, believes that potential PLTS customers should be informed about the features, charges, and options of a PLTS plan in the initial notice provided by a DCTU offering PLTS. The commission, therefore, inserts subparagraph (B) in subsection (d)(2) to ensure that a description of the PLTS plan including its features, charges, and options is included in the initial PLTS notice provided by a DCTU. The remaining subparagraphs under subsection (d)(2) have been renumbered.

Proposed subsection (f)(1)(B) required a DCTU to offset the monthly rate for PLTS, as defined by (f)(1)(A), by the value of the directory assistance calls included in the DCTU's basic local telecommunications service. SWBT, GTE-SW, TEXALTEL, TTA, TSTCI and Fort Bend recommended that proposed subsection (f)(1)(B) be deleted. SWBT argued that the monthly rate offset contemplated by proposed subsection (f)(1)(B) would, in effect, be a commission ordered rate reduction in violation of PURA95 §3.352(d). SWBT also argued that such a provision would be an unlawful ratemaking or rate changing in a rulemaking. SWBT and GTE-SW both suggested that a monthly rate offset misconstrues the purpose of the directory assistance call allowance. SWBT pointed out that customers receiving service under SWBT's basic local telecommunications tariff do not receive a credit if they do not use their entire directory assistance call allowance. GTE-SW suggested that the pricing of directory assistance calls was developed to continue offering the service at no cost to consumers for casual use, while discouraging indiscriminate use by service abusers. GTE-SW also argued that it is unfair to require a credit for the loss of a directory assistance call allowance in light of the front-end systems costs DCTUs will incur to develop and provide PLTS. TEXALTEL stated that proposed subsection (f)(1)(B), as written, is vague and inappropriate. Fort Bend argued that such an offset puts it in a disadvantaged position since it currently provides directory assistance services to its customers at a loss.

The commission agrees with the arguments of SWBT, GTE-SW, TEXALTEL, and Fort Bend. While an argument can be made that PLTS customers are not receiving the full complement of basic services without access to directory assistance, the commission notes that PLTS service is designed as a last chance to subscribe to local service and toll blocking is a critical component of the PLTS offering. The commission recognizes that the lack of directory assistance is tied to the technology used by DCTUs to block toll calls. However, in balancing the equities, the loss of directory assistance is outweighed by the availability of toll blocking which makes PLTS possible. The commission, therefore, deletes subsection (f)(1)(B).

Proposed subsection (f)(2)(A) delineated the components of the initial payment that a PLTS customer is required to make. Specifically, proposed subsection (f)(2)(A)(ii) requires that a PLTS customer pay the non-recurring service connection charges pursuant to paragraph (1)(C) of subsection (f), where authorized. CEJ/CU suggested that the citation to "paragraph (1)(C)" in proposed subsection (f)(2)(A)(ii) be changed to "paragraph (1)(C)(i)" to more accurately reflect the location of the non-recurring service connection charges in the proposed rule. Without the proposed modification, CEJ/CU commented that a PLTS customer would have to pay the non-recurring service restoral charge described in paragraph (1)(C)(ii) as part of the initial payment when the proposed rule has deferred the payment of the service restoral charge until the PLTS customer returns to basic local telecommunications service. SWBT did not oppose this suggestion.

The commission agrees with the suggestion of CEJ/CU but notes that the rule as modified allows DCTUs to assess service connection charges if the customer fails to subscribe to PLTS within 10 days from the date the DCTU mailed a termination notice containing notification of PLTS eligibility. The commission, therefore, modifies proposed subsection (f)(2)(A)(ii) to clarify that applicable service connection charge may be assessed pursuant to renumbered subsection (f)(1)(B).

Under proposed subsection (f)(2)(B), relating to subsequent monthly payments for PLTS, the monthly payments made by a PLTS customer after the initial payment could not exceed the amounts described in subsection (f)(1)(A)-(B) for one month of PLTS service and the due date of such monthly payments was required to be based on the DCTU's regular monthly billing cycle. TEXALTEL suggested that the references to the word "payments" in proposed subsection (f)(2)(B) should be replaced with the word "bills". It argued that a customer should have the flexibility to make larger payments; it is the bill from the DCTU that should be regulated.

The commission agrees with TEXALTEL that a customer should have the flexibility to make larger payments. However, instead of replacing the references to "payments" by the word "bills" as suggested by TEXALTEL, the commission addresses TEXALTEL's concern by modifying the language in proposed subsection (f)(2)(B) so that a DCTU shall not require that a PLTS customer make subsequent monthly payments that exceed the amount prescribed in proposed subsection (f)(2)(B). The commission also deletes the reference to subsection (f)(1)(B) in this subparagraph to reflect the deletion of the provision related to the directory assistance offset.

Proposed subsection (f)(4) set forth a limited deferred payment plan for past due local charges that a DCTU may require as a condition of a customer's subscribing to PLTS. GTE-SW commented that proposed subsection (f)(4) should be broadened to allow DCTUs to require customers to enter into a deferred payment plan for charges other than those incurred for basic local services as a condition of subscribing to PLTS. GTE-SW posited that past due toll charges are receivables that are owned and billed by the DCTU and the prohibition against collection of debts for non-basic local charges places DCTUs at a disadvantage and encourages the use of outside collection processes. MCI and TSTCI similarly urged that the language should be modified to allow DCTUs to require PLTS customers to enter into a deferred payment plan for past due toll charges. MCI asserted that the proposed deferred payment requirements would raise long distance rates for all customers and incent IXCs to seek collection avenues other than contracting with DCTUs. TSTCI, Dell Telephone Cooperative, Inc., La Ward Telephone Exchange, Inc. and Ganado Telephone Company contended the proposed language placed a significant portion of the small company's revenues at risk and appeared to discriminate against the non-PLTS customers who choose to stay on the network by entering into a deferred payment plan agreement to pay off all the debts owed to the DCTU.

The commission disagrees with the comments of GTE-SW, MCI and TSTCI. It is the intent of the commission, in promulgating this rule, to promote universal service by providing access to local services to those customers capable and willing to pay for such service while minimizing the impact on telecommunications carriers doing business in this state. In balancing these interests, the commission created PLTS as an alternative to prohibiting disconnection of basic local service for nonpayment of toll charges. The commission finds that when a customer is placed on PLTS, which is a basic local-only service, the customer should only be required to enter into a deferred payment plan for the same basic local services that the customer will receive under PLTS.

Proposed subsection (f)(4)(A)(ii) required a DCTU to apply any undesignated partial payment made by the customer before subscribing to PLTS, to past debt owed to the DCTU for the category of services included in PLTS. TEXALTEL recommended that proposed subsection (f)(4)(A)(ii) be narrowed to only apply to the customer's last payment to the DCTU for telephone services prior to the customer's subscription to PLTS. TEXALTEL argued that this subsection, as proposed, would encourage the payment for LEC services and reverse past payments collected on behalf of IXCs. TEXALTEL also commented that DCTUs would have to invest considerable amount of time researching a customer's payment history to determine the credit and debit requirements for the entire duration that the customer has had service and thereby, incur substantial implementation costs. TTA argued that the procedure for allocating partial payments in the proposed rule is contrary to the established practices of many LECs. In its reply comments, AT&T suggested that the proposed rule's requirement to allocate partial payment in a particular manner only apply after a delinquency notice is mailed.

The commission finds that there is no evidence on whether DCTUs would incur substantial costs to make a post ante allocation of customer payments. The commission notes that in FCC Report and Order, CC Docket Number 96-45 §393, the FCC requires ILECs to allocate the payments of Lifeline customers in a manner similar to that required by this rule. To the extent, a DCTU incurs costs to make a post ante allocation of customer payments and all or part of such costs are not attributable to the requirements of FCC Order 94-95, the DCTU may pursue cost recovery through rate filings pursuant to PURA95 and commission rules. Although the commission disagrees with the solutions suggested by TEXALTEL and AT&T, the commission finds that TEXALTEL and AT&T have raised a valid concern. Outstanding balances should be tied to the debt creating the delinquency. It was the commission's

intent that the undesignated partial payment be fully applied only to the amount due at the time the undesignated partial payment is made and therefore, adds proposed subsection (f)(4)(A)(iii): "not reallocate any undesignated partial payments assigned under clause (ii) of this subparagraph to amounts yet to be incurred for basic local telecommunications service."

Proposed subsection (f)(4)(B)(i) required that the monthly payments under the deferred payment plan shall not exceed the greater of $10 per month or one-twelfth of the outstanding debt as determined in the proposed rule. CEJ/CU suggested that the maximum deferred payment be reduced from $10 to $5. It is their opinion that a PLTS customer may not have the financial ability to pay more than $5.00 a month towards a deferred payment agreement. SWBT opposed the change.

The commission disagrees with the suggestion of CEJ/CU. It is not unreasonable to require customers to pay $10.00 a month towards a deferred payment agreement. Moreover, to the extent that a deferred payment agreement can be completed in less than twelve months, the administrative burden on DCTUs may be lessened.

MCI recommended that proposed subsection (f)(5)(C) be modified to expressly state that PLTS is not available to business customers.

The commission addressed this concern by adding new subsection (c)(4) to the rule.

Proposed subsection (f)(6)(A) set forth the conditions under which a DCTU must notify a PLTS customer that the customer is being disconnected. TSTCI contended that a DCTU should be allowed to disconnect PLTS customers without notice because customers on the PLTS plan are already aware of their responsibilities as a PLTS customer and of the reasons that could lead to the possible disconnection of service.

The commission disagrees with the suggestion of TSTCI. It is important that customers be made aware of any changes in their status as a DCTU customer. Moreover, it may be more costly for a DCTU to respond to numerous customer inquiries after disconnection from PLTS then to send a standardized letter to such customers.

TEXALTEL commented that §23.46(d) permits disconnection of basic service without notice if a dangerous condition exists. It suggested that proposed subsection (f)(6)(A)(iii) be modified to reflect a similar provision for PLTS customers if a dangerous condition exists.

The commission agrees with the argument of TEXALTEL. A DCTU should have the ability to disconnect customers without notice if a dangerous condition is created by keeping the PLTS customer on the network. Therefore, the commission modifies proposed subsection (f)(6)(B) to permit disconnection of PLTS customers without notice where a known dangerous condition exists for as long as the condition exists or where service is connected without authority by a person who has not applied for the service or who has reconnected service without authority following termination of service for nonpayment.

MCI recommended that a new subsection (f)(6)(A)(iv) be added to expressly state that a PLTS customer will be disconnected after notice if the customer incurs toll charges that are billed to the customer's telephone number. It suggested the following language, "upon the placement or receipt of calls, including long distance for which additional charges are billed to the customer's number by the DCTU through tariffs or contracts, by the PLTS customer."

The commission declines to adopt MCI's suggestion because MCI's concern is addressed by the more stringent language in proposed subsection (f)(6)(B)(i) which permits a DCTU to disconnect PLTS customers *without* notice if the customer accrues billable charges for toll or other services.

Proposed subsections (f)(6)(C) limited PLTS, with some exceptions, to be a one-time option. CEJ/CU suggested that proposed subsections (f)(6)(C) be deleted. They argued that a customer disconnected from PLTS for nonpayment, but who subsequently pays all outstanding basic local telecommunications service and PLTS debt, should be eligible for PLTS service again. SWBT opposed such a deletion.

The commission disagrees with the suggestions of CEJ/CU. PLTS is intended to provide a one-time option from a particular DCTU for customers to promote universal service. It becomes the PLTS customer's responsibility to comply with the terms of PLTS. The DCTU should not be required to repeatedly offer PLTS to customers that do not carry out their responsibilities.

TSTCI argued that it is unnecessary for a DCTU to notify PLTS customers after they have been disconnected from PLTS for violating PLTS terms and conditions. TSTCI believes that the customer is, or should be, aware of their violations of the PLTS terms and conditions and the consequences of such violations.

The commission disagrees. It is in the public interest for customers to be informed when there are substantial changes in the terms and conditions of the services being provided to such customer. This includes disconnection. It is anticipated that the cost associated with the mailing of a form letter to a disconnected PLTS customer would be less than the costs associated with responding to customer calls and complaints.

Proposed subsection (g)(2)(A) through (C) set forth the conditions by which a PLTS customer may return to basic local telecommunications service. These provisions also outline the specific notice requirements by which a DCTU must inform PLTS customers of their eligibility for and option to return to basic local telecommunications service. TSTCI asserted that the PLTS customer should already be aware of the requirements that must be fulfilled prior to requesting a return to basic local telecommunications service. TSTCI argued that the proposed notice requirement is, therefore, unnecessary.

The commission disagrees with TSTCI and finds that the notice requirements are necessary to ensure that customers are fully educated about their options.

Proposed subsection (g)(2)(A) required a DCTU to notify the customer of eligibility requirements for returning to basic local telecommunications services without restriction. MCI commented that the phrase "without restriction", referenced in subsection (g)(2)(A) was too broad and that more appropriate language would read, "in accord with commission rules or the DCTU's tariffs." MCI also asserted that DCTUs should be permitted to impose the current deposit requirements of §23.43 on the former PLTS customers.

The commission clarifies the rule by replacing the phrase "without restriction" in proposed subsection (g)(2)(A) with the phrase "without PLTS restrictions". The commission's intent in including the phrase "without restriction" was to ensure that former PLTS customers returning to basic local telecommunications service are not subject to the restrictions imposed as a condition of subscribing to PLTS. With respect to deposit requirements, the commission agrees with MCI that former PLTS customers should be subject to the same deposit requirements to which a non-PLTS customer subscribing to basic local telecommunications service would be subject. The commission notes that the proposed subsection does not prohibit a DCTU from applying the commission rules and regulations regarding deposit requirements and therefore declines to modify the proposed subsection to address MCI's concern.

MCI also posited that DCTUs should also be required to impose commission- approved mandatory or voluntary toll-limit programs to former PLTS customers.

The commission does not see the need to require DCTUs to impose mandatory or voluntary toll limits on former PLTS customers because those customers have paid off all indebtedness for past due toll charges as a condition to returning to basic local service. The commission restates its position that this rulemaking is not the appropriate forum to address the toll limit issue given that these issues are currently being addressed in other proceedings.

MCI recommended that additional language be added to proposed subsection (g)(2)(B) to clarify that a customer's return to basic local telecommunications service does not confer the availability of toll service; but rather such availability for service is subject to the credit standards of IXCs.

The commission concludes that once a customer has met the conditions for returning to basic local telecommunications service, that customer is entitled to the full array of services, including access to toll, that accompany basic local telecommunications service pursuant to commission substantive rules and regulations. The customer regains access to all local services, including access to toll. This rule does not place any obligations on IXCs to provide toll services to customers.

Proposed subsection (h), relating to consumer education, outlined the means by which DCTUs would be required to notify customers about the PLTS plan. The proposed language required DCTUs to notify customers about PLTS annually through bill inserts and the white page directory section on customer's rights. TSTCI strongly disagreed with these consumer education notice requirements and proposed that subsection (h) be deleted. TSTCI argued that such public notice "invites" customers to incur high long distance bills and then request participation in the PLTS plan. Overall, TSTCI found the amount of notice required by the proposed rule to be unnecessary and burdensome. TSTCI asserted that the initial notice provided to "at-risk" customers is adequate.

The commission disagrees with TSTCI's assertions. The commission notes that DCTUs routinely notify customers through bill inserts, about new services, changes in services, tariffs or rule changes. Furthermore, the commission finds that because the nature of this rule is to promote access and subscribership to local service for universal service reasons, the benefits gained by educating customers about PLTS outweighs any burden imposed on DCTUs in providing such education.

Proposed subsection (i) set forth the provisions for toll and usage sensitive blocking capabilities. MCI noted that there was an absence of language relating to the cost recovery issue for toll and usage sensitive blocking at the tariffed rate in proposed subsection (i)(1)(A). MCI contended that DCTUs should be permitted to charge the tariffed rate, if they so desire, for toll and usage sensitive blocking as part of the subscribership costs for PLTS.

The commission finds that MCI's concern is without merit because proposed subsection (f)(1)(A)(i) already allows DCTUs to recover toll blocking charges at the tariffed rate. With regards to MCI's concern about cost recovery for usage sensitive blocking, no party has presented evidence or comments in this proceeding that DCTUs have tariffed rates applicable to usage sensitive blocking. Moreover, no DCTU has raised the cost recovery issue relating to usage sensitive blocking. For these reasons, the rule does not authorize a charge to PLTS customers for usage sensitive blocking.

Dell Telephone Cooperative, La Ward Telephone Exchange and Ganado Telephone Company commented that they do not have access to the third number and collect call services provided by IXCs that are billed to a customer's line number. They pointed out that mandatory billed number screening which could prevent most of the third number and collect charges was not a requirement in the proposed rule.

The commission's intent in including requirements relating to toll/usage sensitive blocking and notification to IXCs about PLTS was to ensure that toll services and usage sensitive services will be blocked by the DCTU, to the extent technically capable, and that IXCs will themselves be able to take measures to block toll calls with the information they receive about PLTS customers through Customer Access Record Exchange (CARE) or similar reports and Line Identification Database (LIDB). The commission declines to mandate the use of billed number screening by carriers for purposes of blocking a PLTS customer's access to telephone services. However, nothing in the proposed rule precludes carriers from using various methods, including billed number screening, to protect themselves from toll fraud.

TTA found the waiver provision in proposed subsection (j), granted on a wire center by wire-center basis, to be inadequate and self-defeating. It contended that a DCTU that was able to obtain waivers for specific wire centers pursuant to proposed subsection (j) would still have to incur substantial costs by offering PLTS in the rest of its serving area. TTA recommended that the waiver provisions in proposed subsection (j) should be modified to address the inability of specific companies to offer the PLTS plan on a company-wide basis.

The commission's intent in requiring all DCTUs to provide PLTS is to promote universal service in all areas of this state without subjecting telecommunications carriers to toll fraud. The waiver provision in proposed subsection (j) is, therefore, narrowly tailored to address situations where DCTUs lack the technical capability to block access to toll services and/or usage sensitive services in specific wire-center(s). The commission rejects TTA's recommendation because customers located in

wire-centers where a DCTU can meet the blocking requirements delineated in the rule should not be deprived of the choice to subscribe to PLTS. With respect to TTA's argument regarding the substantial costs imposed on DCTUs by the proposed rule, the commission notes that the notification and other requirements in the rule have been developed to reflect the current procedures and practices of the DCTU, to the extent possible, in order to minimize the costs of implementation. As discussed earlier, DCTUs are not precluded from requesting the recovery of any additional costs associated with implementation of the rule by filing a rate case pursuant to PURA95 and commission regulations.

Proposed subsection (k) set forth the interexchange carrier notification requirements. Under proposed subsection (k), a DCTU is required to include a notice in both CARE and LIDB indicating that the customer is subscribed to PLTS with mandatory toll restriction. In its comments, SWBT stated that the commission does not need to regulate this business practice. SWBT also stated that CARE should not be the vehicle for such notification as CARE is limited in access to the customer's presubscribed IXC and CARE contains sensitive customer information. In the public hearing held on May 22, 1997, SWBT clarified that CARE is developed to deal with customer account information and is only available to a customer's presubscribed long distance carrier. SWBT added that CARE is not universally accessible and is processed on a less than real-time basis as compared to LIDB which is processed on a real-time basis. AT&T commented that the IXCs need to be able to implement their own toll blocking or monitoring program to prevent PLTS customers from bypassing the toll blocking imposed by DCTUs. AT&T asserted that IXCs will need timely notification regarding whether a customer is subscribing to PLTS and whether the customer's toll service is blocked. AT&T contended that the proposed requirement for DCTUs to include information concerning the customer's subscription to PLTS in databases and to make that information available to IXCs serving the area, is important in protecting the IXCs from possible additional costs resulting from uncollectibles. AT&T stated that it had reached an agreement with SWBT that reference to the CARE database could be deleted from proposed subsection (k), if DCTUs remain subject to providing the information through LIDB within 24 hours.

The commission concludes that DCTUs shall include notice of customer subscribership to PLTS with mandatory toll restriction in both the CARE and LIDB database. The commission finds that in order to help alleviate or even eliminate toll fraud, it is important for IXCs to be notified about PLTS customers in a timely fashion. The commission notes that the concerns about privacy issues surrounding the use of the CARE database for IXC notification are adequately addressed because information contained in CARE is only available to the customer's presubscribed carrier.

MCI contended that DCTUs should also be required to provide notification, upon request, to any non-DCTU about former and current PLTS customers. MCI also urged the commission to specify a time frame for the provision of notice to IXCs and recommended that such notice should be no later than the notice that the DCTU would provide its long distance affiliate or itself as a provider of long distance service. MCI commented that the IXC notification requirements should also extend to exchanges served by cooperative corporations.

The commission believes that MCI's concern regarding a specific timeframe for the provision of notice to IXCs is adequately addressed by the requirement in the proposed rule that IXC notification should be provided by DCTUs within 24 hours after a customer subscribes to PLTS. The commission disagrees with MCI's suggestion regarding notification to non-DCTUs about former and current PLTS customers. The IXC notification requirements in proposed subsection (k) was designed to prevent PLTS customers from engaging in toll fraud. A non-DCTU, on the other hand, has the responsibility to determine the credit worthiness of potential customers including those that are current PLTS customers or were former PLTS customers. The commission declines to extend the applicability of proposed subsection (k) to cooperative corporations as suggested by MCI. DCTUs serving less than 31,000 access lines and cooperative corporations are not required to comply with the interexchange notification requirements because they indicated in comments, prior to publication of the proposed rule that they did not possess the technical capability to provide such notification expeditiously and would have to incur substantial costs to acquire such technical capability.

TEXALTEL suggested that the references to the "CARE" database may be limited to only SWBT's databases and that other ILECs may have similar reports under different names. TEXALTEL recommended adding the language "or similar report" after each reference to CARE. In its reply comments, TEXALTEL explained that smaller IXCs that issue proprietary calling cards and 800 numbers that are billed by the LEC billing have not found it necessary to use LIDB validation on the calling card calls. Limiting IXC notification about PLTS customers to LIDB databases could prove costly and infeasible for such IXCs because their networks lack the sophistication to launch LIDB queries and even if they are technically capable of performing LIDB queries, the costs and therefore, their rates would increase substantially if these carriers have to query LIDB on every calling card call in order to block the calling card calls of PLTS customers. TEXALTEL recommended that DCTUs offering PLTS could be identified through a reporting mechanism that is available to all IXCs.

The commission modifies proposed subsections (k)(1) through (2), and (k)(4) to address TEXALTEL's concern to include the phrase " or similar report if developed by the DCTU," where appropriate. To address SWBT's concern regarding privacy, the commission adds subsection (k)(5) as follows: "This subsection should not be interpreted as expanding access to CARE, or similar report, to IXCs other than the customers' presubscribed carriers." IXCs that do not receive CARE, or similar reports, as presubscribed carriers but wish to be notified about PLTS customers have the option to perform queries on the LIDB databases.

Proposed subsection (l)(1) through (3) outlines the filing requirements that DCTUs are subject to under the proposed rule. Specifically, proposed subsection (l)(1) requires DCTUs to file tariffs pursuant to §23.24 of this title (relating to Form and Filing of Tariffs). Proposed subsection (l)(2) further requires DCTUs to file tariffs in accordance with a specific schedule. Fort Bend Telephone Company, a company serving less than 31,000 ac-

cess lines, expressed concern about the required filing dates and effective date of the proposed rule. Because Fort Bend "outsources" its billing software system, it may take longer and prove costly to make the billing system changes to accommodate local only customers. Fort Bend Telephone Company suggested that the commission consider a slightly longer compliance period or waiver period for billing system changes. TTA concurred with Fort Bend's statements and suggested that the implementation schedule is far too short for all the DCTUs, regardless of size. TTA claimed that the proposed rule will require many DCTUs to undergo "wholesale changes to comply." TTA recommends that the timelines set forth in the rulemaking should be eliminated and the PLTS plan be made optional.

AT&T, in its reply comments, surmised that the unrealistic compliance schedule in the proposed rule would cause DCTUs to file requests for good cause waivers or to simply fail to comply and face possible enforcement action by the commission. AT&T suggested that smaller DCTUs should be exempted from the requirements of the rule and larger DCTUs should be required to file tariff filings within 90-120 days. AT&T recommended that the effective date of the tariffs could be extended to a later date, such as 150 days after the tariff is approved. GTE-SW commented that it is unlikely, if not impossible for GTE-SW or any other DCTU to define system changes, develop test systems, and implement the service within its required 120 day time frame. GTE-SW asserted that a project implementing a new service of this magnitude would take between 18 and 24 months to accomplish. GTE-SW recommended that the "minimum timeline" for it to complete its implementation of PLTS would be one year from the effective date, with provisions for extension of time should unforeseen circumstances arise. SWBT contended that implementing PLTS was going to require massive changes to its billing, customer service and collection systems/practices and databases and therefore it should be allowed at least 150 days to file compliance tariffs. In its reply comments, TSTCI stated that many of its member companies are dependent on the schedules of outside vending sources for the development and implementation of systems needed for the provision of PLTS and therefore, required additional time to implement PLTS.

The commission addresses the concerns expressed by Fort Bend, TTA, GTE-SW, SWBT, and AT&T by extending the filing date for compliance tariffs in proposed subsection (l). DCTUs with 50,000 or more access lines are required to file compliance tariffs no later than 150 days from the effective date of the rule. DCTUs with fewer than 50,000 access lines must file compliance tariffs no later than 180 days from the effective date of the rule. Because this rulemaking is intended to promote universal service, the commission disagrees with TTA's suggestion and notes that it would be inappropriate to make PLTS an "optional" offering.

CEJ/CU recommended the addition of a new subsection (m) to prohibit any "redlining" or other unfair discrimination in the application of §23.40. Specifically, they suggested the following language: "The DCTU shall offer basic local telecommunications service and PLTS to customers and potential customers in a manner that is not unreasonably preferential, prejudicial, or discriminatory. The DCTU shall comply with this section (23.40) in a manner that is not unreasonably preferential, prejudicial, or discriminatory." SWBT contended that the new section prohibiting discrimination is unnecessary because PURA95 §3.202 would require DCTUs to apply rates in a manner that is not unreasonably preferential, prejudicial, or discriminatory, but instead is sufficient, equitable, and consistent in application to each class of customers. However, SWBT was not opposed to adding this standard regulatory treatment in this rule.

The commission does not find it necessary to adopt CEJ/CU's recommended language because DCTUs are prohibited by PURA95 from engaging in discriminatory or redlining practices in the provision of any service, including PLTS.

With respect to the proposed amendments to rule §23.42, relating to refusal of service, AT&T suggested that references to the term "Dominant Certificated Telecommunications Utility" (DCTU) is unnecessary and duplicative and should be deleted. AT&T stated that the existing rule already applies to the dominant carriers and that the proposed language does not clarify the rule. TEXALTEL raised another issue concerning the term " DCTU." TEXALTEL pointed out that the result of changing the term "utility" to "DCTU" would be to allow the DCTU to deny service to an applicant who has an unpaid bill to another DCTU but would not permit them to deny service to an applicant who has an unpaid bill to a non-dominant CTU. TEXALTEL asserted that this discrepancy is clearly discriminatory and anti-competitive.

The commission agrees with AT&T and TEXALTEL's suggestions and replaces references to the term "DCTU" with the term "utility." The commission also finds that §23.42 is intended to both electric and telecommunications utilities and therefore, the use of the term "utility" is more appropriate than the term "DCTU".

Proposed amendments to §23.46, relating to discontinuance of service, modifies subsection (c), addressing disconnection with notice to include cross-references to §23.40. MCI requested clarification of the proposed language which, in its opinion, does not permit disconnection without notice "where a known and dangerous condition exists" or "where service is connected without authority."

The commission declines to clarify the proposed language because it has previously addressed this issue under subsection (f)(6)(B) of §23.40.

In adopting this section, the commission makes other minor modifications for the purposes of clarifying its intent. All comments, including any not specifically referenced herein, were fully considered by the commission.

The new section and amendments are adopted under the Public Utility Regulatory Act of 1995 as amended (PURA95), Texas Revised Civil Statutes Annotated, Article 1446c-0 (Vernon 1997), §1.101, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §3.051 which authorizes the commission to adopt rules, policies, and procedures to protect the public interest and to provide equal opportunity to all telecommunications utilities in a competitive marketplace.

Cross Index to Statutes: Public Utility Regulatory Act of 1995, §1.101, and §3.051.

§23.40. Prepaid Local Telephone Service.

(a) Applicability. The provisions of this section shall apply to all dominant certificated telecommunications utilities (DCTUs) unless specifically indicated otherwise. A DCTU shall provide Prepaid Local Telephone Service (PLTS) pursuant to the requirements of this section. A DCTU shall not refuse to provide PLTS to an applicant for such service because the applicant is indebted to any DCTU or other telecommunications carrier for telecommunication services, including the carriage charges of interexchange carriers where the DCTU bills those charges pursuant to tariffs or contracts.

(b) Definitions. The following words and terms when used in this section shall have the following meanings unless the context clearly indicates otherwise.

(1) Basic Local Telecommunications Service - That definition given in §3.002 of the Public Utility Regulatory Act of 1995.

(2) Disconnection of telephone service - That period after which a customer's telephone number is deleted from the central office switch and databases.

(3) Prepaid Local Telephone Service (PLTS) - Prepaid Local Telephone Service means:

(A) voice grade dial tone residential service consisting of flat rate service or local measured service, if chosen by the customer and offered by the DCTU;

(B) if applicable, mandatory services, including extended area service, extended metropolitan service, or expanded local calling service;

(C) tone dialing service;

(D) access to 911 service;

(E) access to dual party relay service;

(F) the ability to report service problems seven days a week;

(G) access to business office;

(H) primary directory listing;

(I) toll blocking service; and

(J) non-published service and non-listed service at the customer's option.

(4) Service connection charge - A charge applied by the DCTU to connect service to a customer's telephone line after it has been disconnected by the DCTU.

(5) Service restoral charge - A charge applied by the DCTU to restore service to a customer's telephone line after it has been suspended by the DCTU.

(6) Suspension of telephone service - That period during which the customer's telephone line does not have dial tone but the customer's telephone number is not deleted from the central office switch and databases.

(7) Toll blocking - Blocking of a customer's access to toll providers and toll services.

(8) Usage sensitive blocking - Blocking of a customer's access to services which are charged on a usage sensitive basis for completed calls. Such calls shall include, but not be limited to, call return, call trace, and auto redial.

(c) Eligible customers.

(1) Former customers. In cases where a DCTU would refuse to provide service to an applicant for residential telephone service because of the existence of indebtedness to any DCTU or other telecommunications carrier, such applicant is eligible to receive PLTS pursuant to the requirements of this section.

(2) Current customers. A current residential customer who has not been disconnected from the network but who has received a notice following suspension of service for non-payment for services is eligible to receive PLTS pursuant to the requirements of this section.

(3) Applicant previously disconnected from PLTS by a DCTU. Notwithstanding any other provisions in this section, any applicant who was previously disconnected from PLTS by a DCTU, pursuant to subsection (f)(6) of this section, does not have the right to receive PLTS from that DCTU again.

(4) Business customers shall not be eligible for PLTS.

(d) Requirements for notifying customers about PLTS. A DCTU shall provide notice to its customers about PLTS according to the requirements of this subsection.

(1) Timing of notice.

(A) Notice following suspension of service. If the DCTU's standard practice is to suspend a customer's service for non-payment of charges before disconnecting service, it shall notify such customer of the availability of PLTS in the correspondence notifying the customer that their service has been suspended.

(B) Notice following disconnection of service. If the DCTU's standard practice is to disconnect a customer's service without a period of suspension, the DCTU shall notify such customer of the availability of PLTS within three days after the date of disconnection.

(2) Content of notice. The notice provided by a DCTU offering PLTS shall be reviewed in the DCTU's compliance filing. In the notice, a DCTU offering PLTS shall notify customers of the rates, terms, and conditions of PLTS, as described in subsection (f) of this section, including, but not limited to, the following information:

(A) A customer's eligibility to enter into the PLTS plan;

(B) A description of the PLTS plan including its features, charges, and options;

(C) A customer's responsibility to make an initial payment for PLTS and any applicable service connection charges, as defined in subsection (f)(2)(A) of this section;

(D) A customer's responsibility to make the initial deferred payment, if applicable, in the third billing cycle and every month thereafter, for up to twelve months;

(E) A customer's responsibility not to incur additional charges for calls, including intraLATA and interLATA long distance or other usage-sensitive services that will be charged on the local telephone bill, nor to subscribe to any services from the DCTU other than those included in PLTS, as defined in subsection (b)(3);

(F) A customer's violation of the terms and conditions of the PLTS plan may result in disconnection;

(G) When a DCTU disconnects a customer from PLTS for violation of the terms and conditions of the PLTS plan, a DCTU has the right to retain and apply any credit in the PLTS account to the customer's outstanding balances for telecommunications services;

(H) If a DCTU disconnects a customer for violation of the terms and conditions of the PLTS plan, that customer does not have the right to receive PLTS from that DCTU again; and

(I) The customer's responsibility to subscribe to PLTS within a certain time period in order to receive a deferral of payment of service restoral charges or service connection charges as described in subsection (f)(1)(B).

(e) Subscription into PLTS.

(1) Customer request to subscribe to PLTS. In order to subscribe to PLTS, the eligible customer (per subsection (c) of this section) must contact the DCTU during the DCTU's regular business hours to request PLTS.

(2) Confirmation letter. Within 24 hours of a customer-initiated inquiry in which the customer subscribes to the PLTS plan, the DCTU shall mail the customer a confirmation letter explaining the details of the PLTS plan as described in subsection (d)(2)(A)-(I) of this section, including, but not limited to, the customer's rights and responsibilities upon enrollment and information about the rates, terms and conditions of service under the PLTS plan.

(f) Rates, terms and conditions of PLTS. A DCTU shall offer PLTS under the following terms and conditions:

(1) Rates for PLTS.

(A) Monthly rate. The monthly rate for PLTS shall include only the following:

(i) the applicable residential tariffed rate (or lifeline rates, if applicable), for services included in the PLTS definition in subsection (b)(3)(A) - (I) of this section;

(ii) tariffed charges for non-listed and non-published service, if requested by the customer; and

(iii) surcharges and fees established or authorized by a governmental entity that are billed by the DCTU, including but not limited to 911, subscriber line charge, sales tax, and municipal fees.

(B) Non-recurring rates.

(i) Service connection charges. If a DCTU does not suspend basic local service prior to disconnection, the DCTU must defer recovery of tariffed service connection charges until the subscribing customer leaves PLTS to return to basic local telecommunications service pursuant to subsection (g) of this section. However, if a customer does not subscribe to PLTS within 10 days from the date the DCTU mailed a termination notice containing notification of PLTS eligibility to that subscriber, the DCTU may charge service connection charges to that subscriber when subscribing to PLTS.

(ii) Service restoral charges. If a DCTU suspends basic local service prior to disconnection, the DCTU must defer recovery of the tariffed service restoral charges until the subscribing customer leaves PLTS to return to basic local telecommunications service pursuant to subsection (g) of this section.

(C) Late charges. The DCTU shall not assess late charges on a customer of PLTS.

(2) Payments under PLTS.

(A) Initial payment for PLTS. A DCTU may require the residential customer of PLTS to make an initial payment for service, which shall not exceed:

(i) the rates as described in paragraph (1)(A) of this subsection for up to two months of service under the PLTS plan; and

(ii) applicable non-recurring service connection charges pursuant to paragraph (1)(B) of this subsection.

(B) Subsequent monthly payments for PLTS. A DCTU shall not require subsequent monthly payments for PLTS that exceed the rates as described in paragraph (1)(A) of this subsection for one month of service under PLTS. The due date of such monthly payments shall be based on the DCTU's regular monthly billing cycle.

(C) Payments under the deferred payment plan. A customer may be required to make payments under the deferred payment plan pursuant to paragraph (4) of this subsection.

(3) Toll blocking. A customer who subscribes to the PLTS shall have mandatory toll blocking and usage sensitive blocking placed on the customer's telephone line.

(A) Customer responsibility. A customer subscribing to PLTS shall not place or receive calls, including intraLATA and interLATA long distance or other usage-sensitive services, for which additional charges are billed to the customer's telephone number by the DCTU, through tariffs or contracts nor subscribe to any services from the DCTU other than those included in PLTS, as defined in subsection (b)(3).

(B) DCTU responsibility. During the customer-initiated inquiry regarding PLTS and in the subsequent confirmation letter described in subsections (d) and (e) of this section, the DCTU shall notify the customer of their responsibilities pursuant to subparagraph (A) of this paragraph.

(4) Deferred payment plan under PLTS. As a condition of subscribing to PLTS, the DCTU may require an applicant to enter into a deferred payment plan for any outstanding debt owed to the DCTU for the services previously received under basic local telecommunications service and now subscribed to under PLTS. The DCTU shall not require an applicant for PLTS to enter into a deferred payment plan to pay any outstanding debt for any services that will not be received by the customer under PLTS including, but not limited to, intraLATA and interLATA long distance services. If the DCTU is unable to determine the amount of outstanding debt owed for the services previously received under basic local telecommunications service and now subscribed to under PLTS, the DCTU shall not require an applicant to enter into any deferred payment plan.

(A) Determination of deferred payment plan amount. To determine the deferred payment plan amount, the DCTU shall:

(i) determine the amount the customer owes for the services previously received under basic local telecommunications service and which the customer subscribes to under PLTS;

(ii) apply any undesignated partial payment made by the customer prior to the customer's subscription to PLTS to past debt which was owed to the DCTU for the services previously received under basic local telecommunications service and which the customer subscribes to under PLTS; and

(iii) not reallocate any undesignated partial payments assigned under clause (ii) of this subparagraph to amounts yet to be incurred for basic local telecommunications service.

(B) Monthly payments under the deferred payment plan.

(i) A deferred payment plan for past due charges under this paragraph shall not require the applicant to make monthly payments which exceed the greater of $10 per month or one-twelfth of the outstanding debt as determined in subparagraph (A) of this paragraph.

(ii) If the DCTU and PLTS customer enter into a deferred payment under this paragraph, the initial deferred payment shall be billed beginning with the third billing cycle after initiation of service and shall be billed on a monthly basis thereafter.

(5) Customer deposit. No deposit shall be required from any residential applicant for PLTS.

(6) Disconnection of PLTS.

(A) Disconnection with notice. A DCTU may disconnect PLTS after notice for any of the following reasons:

(i) failure to comply with the terms of a deferred payment plan for PLTS;

(ii) upon conclusion of all periods for which an advance payment has been applied to the PLTS account and when the customer's PLTS account has a zero balance; or

(iii) violation of the DCTU's rules pertaining to the use of PLTS in a manner which interferes with the service of others or the operation of nonstandard equipment, if a reasonable attempt has been made to notify the customer and the customer is provided with a reasonable opportunity to remedy the situation.

(B) Disconnection without notice. Notwithstanding any other provision of this chapter, a DCTU may immediately disconnect PLTS without notice:

(i) if the customer accrues new billable charges for toll or other services on their telephone bill as described in paragraph (3) of this subsection;

(ii) where a known dangerous condition exists for as long as the condition exists; or

(iii) where service is connected without authority by a person who has not applied for the service or who has reconnected service without authority following termination of service.

(C) Notice after disconnection. If a PLTS customer is disconnected under subparagraph (A) or (B) of this paragraph, a DCTU shall send a final notice stating that the customer is permanently disconnected from PLTS and that the customer shall not be eligible for PLTS from that DCTU. That notice shall also state the terms and conditions that the customer must satisfy before the customer can return to basic local telecommunications service.

(g) Return to basic local telecommunications service.

(1) Customer's option to return to basic local telecommunications service. A customer subscribing to PLTS may return to basic local telecommunications service provided the customer:

(A) has paid all outstanding debt to the DCTU in full, including indebtedness for the carriage charges of interexchange carriers where the DCTU bills those charges pursuant to tariffs or contracts; and

(B) has paid all bills for PLTS.

(2) Notice of eligibility to return to Basic Local Telecommunications Service. Upon customer's completion of the obligations identified in paragraph (1) of this subsection, a DCTU shall:

(A) notify the customer of the eligibility requirements for returning to basic local telecommunications services without PLTS restrictions;

(B) notify the customer of the option of receiving basic local telecommunications service with toll blocking and/or usage sensitive blocking pursuant to the DCTU's tariffed rate, if applicable, and such toll restriction and usage sensitive blocking can be removed at any time, upon the customer's request; and

(C) notify the customer of the need to contact the DCTU if the customer wants to return to basic local telecommunications service.

(3) Customer obligations after receiving notice. In addition to fulfilling the requirements of paragraph (1) of this subsection, in order to subscribe to basic local telecommunications service, the customer shall:

(A) request subscription to basic local telecommunications service from the DCTU; and

(B) pay the service restoral or service connection charges as described in subsection (f)(1)(B) of this section, if applicable and assessed by the DCTU.

(h) Consumer education.

(1) The commission shall provide information about the PLTS plan to customers.

(2) A DCTU subject to the requirements of this section shall provide information about the PLTS plan annually in the customers' bills and such information shall be subject to review during the DCTU's compliance filing.

(3) A DCTU or its affiliate publishing a white pages directory, on behalf of the DCTU, shall disclose in clear language the availability, terms, and conditions of the PLTS plan in the same part of its telephone directory in which it provides information in the section of the directory delineating the rights of a customer.

(i) Toll and usage sensitive blocking capability.

(1) The DCTU shall provide toll blocking and usage sensitive blocking to its maximum technical capability.

(A) If the DCTU's tariffs reflect its maximum technical capability, it shall provide toll blocking and usage sensitive blocking as stated in those tariffs.

(B) If the DCTU's tariffs does not reflect its maximum technical blocking capability, it shall inform the commission of the

maximum level of blocking it is required to provide under PLTS in its compliance filings.

(C) If the DCTU does not have a tariff for toll blocking or usage sensitive blocking but has such technical capability, it shall inform the commission of the maximum level of blocking it is required to provide under PLTS in its compliance filings.

(D) As the DCTU's blocking capability increases, it shall notify the commission of such enhancements and provide such enhanced blocking under PLTS.

(2) Where technically capable, toll blocking shall not deny access to 1-800 or 1-888 calls.

(3) When imposing a toll block or usage sensitive services block, the DCTU shall do so in a manner that is not unreasonably preferential, prejudicial or discriminatory.

(j) Waiver request.

(1) A DCTU may request a waiver to exempt it from the requirements of this section, on a wire-center by wire-center basis, if it cannot meet the toll blocking and/or usage sensitive requirements stated in subsection (i)(1) of this section.

(2) A DCTU requesting a waiver under paragraph (1) of this subsection shall fully document in its compliance filings the technical reasons for its inability to toll block and/or usage sensitive block and indicate when such technical capability will be available in the wire center.

(3) A waiver received pursuant to this subsection shall expire when the DCTU acquires the technical capability to block toll services and/or usage sensitive services or when the DCTU is required to acquire the technical capability to toll block and/or usage sensitive block by federal or state law or regulations, whichever comes first. The DCTU shall notify the commission in writing within 30 days of acquiring such technical capability or within 30 days of being required to acquire such technical capability.

(k) Interexchange carrier (IXC) notification. A DCTU serving 31,000 or more access lines and that is not a cooperative corporation shall:

(1) Within 24 hours after a customer subscribes to PLTS, the DCTU shall include a notice in the Customer Access Record Exchange (CARE) or similar report if developed by the DCTU, and the Line Identification Database (LIDB) indicating that the customer is subscribed to PLTS with mandatory toll restriction;

(2) Additionally, the DCTU shall include a notice in CARE, or similar report if developed by the DCTU, and LIDB, within 24 hours, indicating any number change associated with a customer who subscribes to PLTS;

(3) Access to the information contained in LIDB shall be available to all IXCs serving the customer's area;

(4) If CARE, or similar report if developed by the DCTU, and LIDB are not available, the DCTU shall specify in its tariffs a comparable method of providing such notice to IXCs serving the area indicating a customer's subscription to PLTS; and

(5) This subsection should not be interpreted as expanding access to CARE, or similar report if developed by the DCTU, to IXCs other than the customers' presubscribed carriers.

(l) Filing requirements.

(1) A DCTU subject to this section shall file tariffs in compliance with this section, pursuant to §23.24 of this title (relating to Form and Filing of Tariffs).

(2) Tariff filings to implement provisions of this section shall be filed according to the following schedule:

(A) DCTUs with 50,000 or more access lines shall file no later than 150 days from the effective date of this section.

(B) DCTUs with fewer than 50,000 access lines shall file no later than 180 days from the effective date of this section.

(3) The proposed effective date for tariff filings submitted pursuant to paragraph (2) of this subsection shall be no later than 30 days after the filing date, unless suspended.

§23.42. Refusal of service.

(a) (No change.)

(b) Compliance by applicant. Any utility may decline to serve an applicant until such applicant has complied with the state and municipal regulations and approved rules and regulations of the utility on file with the commission governing the service applied for or for the following reasons:

(1) (No change.)

(2) For indebtedness. Except as provided in §23.40 of this title (relating to Prepaid Local Telephone Service), if the applicant is indebted to any utility for the same kind of service as that applied for, including only the carriage charges of interexchange carriers where a local exchange carrier bills those charges pursuant to its tariffs; provided, however, that in the event the indebtedness of the applicant is in dispute, the applicant shall be served upon complying with the deposit requirement in §23.43 of this title (relating to Applicant and Customer Deposit). In the event that the appropriate federal authority prohibits payment of interstate carriage charges of interexchange carriers as a condition of local exchange service or prohibits disconnection of local exchange service for failure to pay interexchange carriage charges, payment of intrastate carriage charges of interexchange carriers shall not be a condition for local exchange service .

(3) (No change.)

(c)-(d) (No change.)

§23.43. Applicant and Customer Deposit.

(a) (No change.)

(b) Establishment of credit for permanent residential applicants.

(1)-(3) (No change.)

(4) An initial deposit may not be required from residential customers unless the customer has more than one occasion during the last 12 consecutive months of service in which a bill for utility service was paid after becoming delinquent or if the customer's service was disconnected for nonpayment. Except as provided in §23.40 of this title (relating to Prepaid Local Telephone Service), a deposit required pursuant to this section shall not exceed an amount equivalent to one-sixth of annual billings including the carriage charges of interexchange carriers only where a local exchange carrier's tariffs provide for billing for the interexchange carrier. Such deposit may

be required to be made within ten days after issuance of written termination notice and requested deposit. In lieu of initial deposit, the customer may elect to pay the current bill by the due date of the bill, provided the customer has not exercised this option in the previous 12 months. The customer may furnish in writing a satisfactory guarantee to secure payment of bills in lieu of cash deposit. In the event the appropriate federal authority prohibits inclusion of interstate charges for an interexchange carrier in the determination of the deposit amount, or prohibits payment of interexchange carriage charges as a condition for local exchange service or reason for disconnection of local exchange service, intrastate carriage charges of an interexchange carrier shall not be included in the determination of the deposit amount.

(5) (No change.)

(c)-(k) (No change.)

§23.45. Billing.

(a)-(o) (No change.)

(p) To the extent any provisions of this section are applied to customers subscribing to Prepaid Local Telephone Service and are inconsistent with the rates, terms, and conditions of §23.40 of this title (relating to Prepaid Local Telephone Service), the provisions of §23.40 shall apply.

§23.46. Discontinuance of Service.

(a)-(b) (No change)

(c) Disconnection with notice. Utility service may be disconnected after proper notice for any of the following reasons:

(1) except as provided in §23.40 of this title (relating to Prepaid Local Telephone Service), failure to pay a delinquent account for utility service or failure to comply with the terms of a deferred payment agreement including only the carriage charges of interexchange carriers where a local exchange carrier's tariff provides for billing for those carriers. In the event the appropriate federal authority prohibits disconnection of local exchange telephone service for failure to pay the interstate charges of an interexchange carrier or prohibits payment of interexchange carriage charges as a condition of local exchange telephone service, intrastate carriage charges of an interexchange carrier shall not be a cause for disconnection of local exchange telephone service.

(2)-(3) (No change.)

(d) Disconnection without notice. Except as provided in §23.40 of this title (relating to Prepaid Local Telephone Service), utility service may be disconnected without notice where a known dangerous condition exists for as long as the condition exists or where service is connected without authority by a person who has not made application for service or who has reconnected service without authority following termination of service for nonpayment or in instances of tampering with the utility company's meter or equipment, bypassing the same, or other instances of diversion as defined in §23.47 of this title (relating to Meters). Where reasonable, given the nature of the hazardous condition, a written statement providing notice of disconnection and the reason therefor shall be posted at the place of common entry or upon the front door of each affected residential unit as soon as possible after service has been disconnected.

(e)-(n) (No change.)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711237
Rhonda Dempsey
Rules Coordinator
Public Utility Commisison of Texas
Effective date: September 15, 1997
Proposal publication date: April 11, 1997
For further information, please call: (512) 936–7308

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TITLE 22. EXAMINING BOARDS

Part IX. Texas State Board of Medical Examiners

Chapter 163. Licensure

22 TAC §163.14

The Texas State Board of Medical Examiners adopts an amendment to §163.14, concerning licensure, with changes to the proposed text as published in the July 1, 1997, issue of the *Texas Register* (22 TexReg 6171).

The amendment removes the ability for an applicant who is a graduate of a medical school located outside the United States or Canada, to practice medicine in the state without holding a valid ECFMG certificate.

One comment was received from American Osteopathic Association. This organization commented that the Advisory Board for Osteopathic Specialists was reorganized in 1993 and was renamed the Bureau of Osteopathic Specialists, and the organization requested that this name change be reflected in the rule. The board agrees and the change has been made.

The amendment is adopted under the Medical Practice Act, Texas Civil Statutes, Article 4495(b), §2.09(a), which provides the Texas State Board of Medical Examiners with the authority to make rules, regulations, and bylaws not inconsistent with this Act as may be necessary for the governing of its own proceedings, the performance of its duties, the regulation of the practice of medicine in this state, and the enforcement of this Act.

§163.14. Temporary Licensure of Primary Care Physicians for Practice in Rural Counties or Medically Underserved Areas in Texas.

(a) (No change.)

(b) If the executive director of the board determines that it is in the best interest of the public and that the health and welfare of the public will not be endangered, but will be served, the executive director of the board may, at his discretion, issue a temporary license to an endorsement applicant:

(1)-(2) (No change.)

(3) who has met all requirements for licensure, except certification by a specialty board that is a member of the American

Board of Medical Specialties or the Bureau of Osteopathic Specialists, if such certification is required for licensure;

(4)-(5) (No change.)

(c)-(e) (No change.)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711259
Bruce A. Levy, M.D., J.D.
Executive Director
Texas State Board of Medical Examiners
Effective date: September 15, 1997
Proposal publication date: July 1, 1997
For further information, please call: (512) 305–7016

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Chapter 167. Reinstatement

The Texas State Board of Medical Examiners adopts the repeal of §167.2 and new §167.2 and §167.3, concerning, reinstatement, without changes to the proposed text as published in the July 1, 1997, issue of the *Texas Register* (22 TexReg 6172).

The repeal and new sections will allow due process for reinstatement applications. The language contained in the existing §167.2 is being moved to new §167.3.

Two individuals commented on the proposed rules. One individual commented that the rule would encourage settlement of reinstatement cases, save both Board and applicant resources and provide a mechanism for informal disposition. The process would also help expedite cases. Board expertise could be used in an informal setting and appropriate resolutions may be available. Another individual commented that the rule would expedite the reinstatement process and would be a cost saver for both the Board and applicants. The Informal Settlement Conference mechanism is more appropriate to resolve certain cases than a contested hearing process. The Board agreed with the comments.

22 TAC §167.2

The repeal is adopted under the Medical Practice Act, Texas Civil Statutes, Article 4495(b), §2.09(a), which provides the Texas State Board of Medical Examiners with the authority to make rules, regulations, and bylaws not inconsistent with this Act as may be necessary for the governing of its own proceedings, the performance of its duties, the regulation of the practice of medicine in this state, and the enforcement of this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711258
Bruce A. Levy, M.D., J.D.
Executive Director
Texas State Board of Medical Examiners
Effective date: September 15, 1997
Proposal publication date: July 1, 1997
For further information, please call: (512) 305–7016

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22 TAC §167.2, §167.3

The new sections are adopted under the Medical Practice Act, Texas Civil Statutes, Article 4495(b), §2.09(a), which provides the Texas State Board of Medical Examiners with the authority to make rules, regulations, and bylaws not inconsistent with this Act as may be necessary for the governing of its own proceedings, the performance of its duties, the regulation of the practice of medicine in this state, and the enforcement of this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711257
Bruce A. Levy, M.D., J.D.
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Effective date: September 15, 1997
Proposal publication date: July 1, 1997
For further information, please call: (512) 305–7016

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Chapter 175. Schedule of fees and Penalties

22 TAC §175.1

The Texas State Board of Medical Examiners adopts an amendment to §175.1, concerning schedule of fees and penalties, without changes to the proposed text as published in the July 1, 1997, issue of the *Texas Register* (22 TexReg 6174).

The amendment will establish reasonable fees so that the fees produce sufficient revenue to cover the cost of administering the program.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Medical Practice Act, Texas Civil Statutes, Article 4495(b), §2.09(a), which provides the Texas State Board of Medical Examiners with the authority to make rules, regulations, and bylaws not inconsistent with this Act as may be necessary for the governing of its own proceedings, the performance of its duties, the regulation of the practice of medicine in this state, and the enforcement of this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711256
Bruce A. Levy, M.D., J.D.
Executive Director
Texas State Board of Medical Examiners

Effective date: September 15, 1997
Proposal publication date: July 1, 1997
For further information, please call: (512) 305–7016

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Chapter 177. Certification of Non-Profit Organizations

22 TAC §177.11

The Texas State Board of Medical Examiners adopts an amendment to §177.11, concerning certification of non-profit organizations, without changes to the proposed text as published in the July 1, 1997, issue of the *Texas Register* (22 TexReg 6175).

The amendment will assure compliance with requirements that the physicians of §5.01(a) non-profit health organizations are not unduly influenced by the non-physician member(s) of the organization.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Medical Practice Act, Texas Civil Statutes, Article 4495(b), §2.09(a), which provides the Texas State Board of Medical Examiners with the authority to make rules, regulations, and bylaws not inconsistent with this Act as may be necessary for the governing of its own proceedings, the performance of its duties, the regulation of the practice of medicine in this state, and the enforcement of this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711255
Bruce A. Levy, M.D., J.D.
Executive Director
Texas State Board of Medical Examiners
Effective date: September 15, 1997
Proposal publication date: July 1, 1997
For further information, please call: (512) 305–7016

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Chapter 183. Acupuncture

22 TAC §§183.2, 183.7, 183.20, 183.22

The Texas State Board of Medical Examiners adopts amendments to §§183.2, 183.7, 183.20, and 183.22, concerning acupuncture. Section 183.2 is adopted with changes to the proposed text as published in the July 1, 1997, issue of the *Texas Register* (22 TexReg 6175). Sections 183.7, 183.20 and 183.22 are adopted without changes and will not be republished.

The amendments will require licensure applicants to pass a herbology section of the NCCA examination; outline disciplinary guidelines to provide guidance for administrative law judges and board members; clarify correct title of master degrees; outline procedures for implementation of continuing acupuncture education requirements.

Changes were made to §183.2, regarding the definition for "Full NCCA examination" to incorporate a January 1, 1998 effective date for the Chinese Herbology Exam.

The Texas Student Acupuncture Association commented that the rule requiring the herbology portion of the NCCA examination has created an undue hardship on acupuncture students and constitutes over-regulation of the profession. They went on to comment that they did not commit to herbology when they enrolled in acupuncture school and that they oppose the herbology exam requirement because students are receiving an acupuncture license, not an herbologist's license.

The following are the reasons why the Board disagrees with the submissions and proposals set forth above: The practice of herbology is within the scope of practice for licensed Texas acupuncturists and the Board wanted to ensure that licensure applicants had proved a minimum competency level in herbology. Currently, Acupuncture Board rules mandate that students must have 450 hours of herbal studies in order to apply for a Texas license. Consequently, the requirement of the herbology portion of the exam is not unduly burdensome.

The amendments are adopted under the Medical Practice Act, Texas Civil Statutes, Article 4495(b), §2.09(a), which provides the Texas State Board of Medical Examiners with the authority to make rules, regulations, and bylaws not inconsistent with this Act as may be necessary for the governing of its own proceedings, the performance of its duties, the regulation of the practice of medicine in this state, and the enforcement of this Act.

§183.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the content clearly indicates otherwise.

Full NCCA examination-The National Commission for the Certification of Acupuncturists' examination, consisting of the Comprehensive Written Exam (CWE), the Clean Needle Technique Portion (CNTP), and the Practical Examination of Point Location Skills (PEPLS), and, effective January 1, 1998, the Chinese Herbology Exam.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711254
Bruce A. Levy, M.D., J.D.
Executive Director
Texas State Board of Medical Examiners
Effective date: September 15, 1997
Proposal publication date: July 1, 1997
For further information, please call: (512) 305–7016

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Chapter 185. Physician Assistants

22 TAC §§185.4, 185.6, 185.7, 185.14, 185.19, 185.20, 185.24

The Texas State Board of Medical Examiners adopts amendments to §§185.4, 185.6, 185.7, 185.14, 185.19, 185.20,

185.24, concerning physician assistants. Section 185.4(e) is adopted with a non-substantive change to the proposed text as published in the July 1, 1997, issue of the *Texas Register* (22 TexReg 6178). In the proposal a section site was listed incorrectly as §185.8. The correct reference is §185.7 of this title (relating to Temporary License). Sections 185.6, 185.7, 185.14, 185.19, 185.20, and 185.24 are adopted without changes and will not be republished.

The amendments will add documentation requirements for licensure; will provide an explanation of carryover of continuing medical education hours; clarify time frame for issuance of temporary licenses; clarify procedural rules for publication of the notice of adjudicative hearings.

No comments were received regarding the amendments.

The amendments are adopted under the Medical Practice Act, Texas Civil Statutes, Article 4495(b), §2.09(a), which provides the Texas State Board of Medical Examiners with the authority to make rules, regulations, and bylaws not inconsistent with this Act as may be necessary for the governing of its own proceedings, the performance of its duties, the regulation of the practice of medicine in this state, and the enforcement of this Act, and the Physician Assistant Licensing Act, Texas Civil Statutes, Article 4495b-1, §23, which authorizes the Texas State Board of Physician Assistant Examiners to adopt reasonable and necessary rules for the performance of its duties.

§185.4. Procedural Rules for Licensure Applicants.

(a)-(c) (No change.)

(d) All physician assistant applicants shall provide sufficient documentation to the board that the applicant has, on a full-time basis, actively practiced as a physician assistant or has been a student at an acceptable approved physician assistant program or has been on the active teaching faculty of an acceptable approved physician assistant program, within each of the last two years preceding receipt of an application for licensure. The term "full-time basis," for purposes of this section, shall mean at least 20 hours per week for 40 weeks duration during a given year. Applicants who do not meet the requirements of subsections (a) and (b) of this section may, in the discretion of the board, be eligible for an unrestricted license or a restricted license subject to one or more of the following conditions or restrictions as set forth in paragraphs (1)-(4) of this subsection:

(1) current certification by the National Commission on the Certification of Physician Assistants;

(2) completion of specified continuing medical education hours approved for Category I credits by a CME sponsor approved by the American Academy of Physician Assistants;

(3) limitation and/or exclusion of the practice of the applicant to specified activities of the practice as a physician assistant;

(4) remedial education;

(5) such other remedial or restrictive conditions or requirements which, in the discretion of the board are necessary to ensure protection of the public and minimal competency of the applicant to safely practice as a physician assistant.

(e) Applicants for licensure:

(1) whose documentation indicates any name other than the name under which the applicant has applied must furnish proof of the name change;

(2) whose application for licensure which has been filed with the board office and which is in excess of two years old from the date of receipt, shall be considered inactive. Any fee previously submitted with the application shall be forfeited. Any further application procedure for licensure will require submission of a new application and inclusion of the current licensure fee;

(3) who in any way falsify the application may be required to appear before the board;

(4) on whom adverse information is received by the board may be required to appear before the board;

(5) shall be required to comply with the board's rules and regulations which are in effect at the time the completed application form and fee are filed with the board;

(6) may be required to sit for additional oral or written examinations that, in the opinion of the board, are necessary to determine competency of the applicant;

(7) must have the application of licensure complete in every detail 20 days prior to the board meeting in which they are considered for licensure. Applicants may qualify for a Temporary License prior to being considered by the board for licensure, as required by §185.7 of this title (relating to Temporary License);

(8) who previously held a Texas health care provider license may be required to complete additional forms as required.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711253
Bruce A. Levy, M.D., J.D.
Executive Director
Texas State Board of Medical Examiners
Effective date: September 15, 1997
Proposal publication date: July 1, 1997
For further information, please call: (512) 305–7016

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Part XVII. Plumbing Examiners

Chapter 361. Administration

Fees

22 TAC §361.6

The State Board of Plumbing Examiners adopts amendment to §361.6, Fees, without changes to the proposed text as published in the June 20, 1997, issue of the *Texas Register* (22 TexReg 5882). The amendment sets the inspector's fees to take the Medical Gas or Water Protection Specialist Endorsement examination, to become licensed or to renew a license.

No comments were received regarding the adoption of the amendment.

The rule amendment is adopted under Texas Civil Statutes, Article 6243-101, which provide the Texas State Board of Plumbing Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711293
Ernest Pereya, CPA
Chief Fiscal Officer
Plumbing Examiners
Effective date: September 15, 1997
Proposal publication date: June 9, 1997
For further information, please call: (512) 458-2145

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Part XXV. Structural Pest Control Board

Chapter 593. Licenses

22 TAC §593.23, 593.24

The Structural Pest Control Board adopts amendments of 22 TAC 593.23 and 593.24 with changes to the proposed text published June 27, 1997 in the 22 TexReg 6089 issue of the *Texas Register* . 593.23 is adopted without change. 593.24 is adopted with changes. The changes create a requirement for the course sponsor to grade the examination. The proctors are required to be certified applicators.

Justification for the rule are the amendments facilitate compliance with structural pest control regulations by allowing certified applicators to obtain some of their recertification credits through self-study..

The rule will function in that the amendments allow for a maximum of two (2) credits per year through self-study. They also establish criteria for evaluation and approval of self-study courses.

Several commenters were concerned about the qualifications of exam proctors. A few did not feel that self-study credits were necessary.

The groups or associations making comments for and/or against the rule were the Texas Pest Control Association. They were in favor of the rule with changes to the proctor requirement which was adopted.

The agency agreed with the need for qualifying exam proctors. The requirements were changed to make proctors certified applicators. The agency believes self-study allows greater flexibility to certified applicators in meeting their requirements. The examination requirement is a sufficient safeguard that education is taking place.

The amendment is adopted under Article 135b-6, which provides the Structural Pest Control Board with the authority to license and regulate the structural pest control industry.

§593.24 Criteria and Evaluation of Continuing Education

(a) Each continuing education program submitted for approval shall contain the following:

(1) a brief statement giving the learning objective(s), and information to be gained;

(2) the procedure to be used in verifying the participant's comprehension of subject matter presented. These methods may include, but are not limited to, examination and post-activity questionnaires, practical applications, field demonstrations, in-class workbooks, or any other recognized educational technique that would assure mastery of subject matter;

(3) a copy of handout materials, if any, which will be distributed to participants during the course;

(4) inclusive length of time of the course stated in hours, and minutes except for self-study courses:

(5) first date of presentation or examination for self-study courses or if unknown, agreement to provide two (2) weeks notice of the first date of presentation or examination to the Executive Director;

(6) category(ies) and number of points in which continuing education units are requested; and

(7) a detailed course outline which will indicate the scope of the course and learning objectives.

(b) The minimum requirements to qualify as a speaker, course presenter or self-study course provider are:

(1) a degree from a recognized institution of higher learning which pertains to the course being taught; or

(2) five years experience as an applicator certified by the Structural Pest Control Board with a current license in the speciality to be taught; or

(3) verifiable proof of training and teaching experience within the preceeding three years; or

(4) a combination of education, work related training, and teaching experience which, in the opinion of the Board, would be equivalent to two of the three requirements as previously stated.

(c) Each continuing education program submitted for approval shall be accompanied by the following information on each speaker, course presenter and self-study course provider;

(1) name, address, telephone number and company, organization or institution of higher learning affiliation;

(2) a resume' which includes, but is not limited to, the following information:

(A) formal education-degrees held and granting institutions;

(B) industry-related technical experience which relates to the subject matter to be taught;

(C) industry-related teaching experience which relates to the subject matter to be taught;

(D) address and telephone number of at least three references;

(E) membership in trade associations and/or professional organizations; and

(F) publications as sole or junior author.

(d) Each continuing education program submitted for approval will be accompanied by:

(1) a means or system which verifies that participants attended the training program throughout its stated length or completed the self-study program. These systems may include, but are not limited to, sign-in-sign-out rosters, course completion certificates, or the system may be incorporated into the means to verify the participant's comprehension of a subject matter presented.

(2) a certificate of completion. This document must include at least the following information:

(A) certified applicator name and certified applicators assigned number;

(B) name of sponsor or sponsoring agency, company or organizations;

(C) number and category of continuing education points awarded;

(D) date and location of training event or verification test.

(3) a statement that the sponsor agrees to maintain course completion records for two years and that a list of participants will be forwarded to the Board within 14 days of completion of the training course.

(4) a non-refundable annual fee of $60 for consideration of the course for approval and monitoring for the calendar year. Nonprofit organizations are exempt from this fee if the course is presented as a part of the legally mandated function of the organization.

(e) For purposes of this section, a course is defined as any number of points of instruction presented by any one sponsor, company, or organization in any one category of license recertification.

(f) Videotapes, slides or other media presentations shall not be approved by the Board unless accompanied by a qualified speaker and course outline, as required by subsections (a) and (c)of this section or unless approved as a self-study course under subsection (h) of this section.

(g) Personnel of the Texas Structural Pest Control Board are exempt from any fee charged for a continuing education program if they are monitoring the program as a part of their duties of their employment.

(h) A course may be approved as a self-study course if it meets the following additional criteria:

(1) attendees must take an examination designed to verify their knowledge of the material provided in the course. The course sponsors must grade the examination and keep records for a minimum of two (2) years.

(2) the attendees grade on the examination must be at least 70% correct to obtain credit for the course.

(3) the examination must be proctored by the course provider or person responsible to the course provider. The examination location must be made available and accessible to Structural Pest Control Board staff.

(4) A self-study course Examination Monitor must be a certified applicator licensed by the Structural Pest Control Board.. Anyone serving as an Examination Monitor may not take a Verification Exam for credit while serving as a Monitor.

(i) "Sponsor" means the person, company or organization that compiles, organizes, writes and/or produces training courses submitted to the Structural Pest Control Board for approval as a continuing education program for recertification points. The sponsor is responsible for establishing procedures for verification of completion and comprehension of its courses, and for awarding Course Completion Certificates. The Sponsor shall be responsible for the qualifications, competence and performance of the Authors, Speakers, Presenters, or Instructors who produce or present its courses, and for performance of Self-Study Course Examination Monitors.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711108
Benny M. Mathis, Jr.
Executive Director
Structural Pest Control Board
Effective date: September 11, 1997
Proposal publication date: June 27, 1997
For further information, please call: (512) 451–7200

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 9. Title Insurance

Subchapter A. Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas

28 TAC §9.1

The Texas Department of Insurance adopts an amendment to §9.1, with one change to the proposed text as published in the June 27, 1997, issue of the *Texas Register* (22 TexReg 6091). The rules and forms proposed were considered at the 1996 Texas Title Insurance Biennial Rule and Form Hearing held on March 25, 1997, at 9:00 a.m., under Docket Number 2278 in Room 100 of the Texas Department of Insurance Building, 333 Guadalupe Street in Austin, Texas.

The amendment concerns the adoption by reference of certain amendments to the Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas (the Basic Manual). The amended section is necessary to reflect amendments to the Basic Manual, which the section adopts by reference. The amendments to the Basic Manual are necessary to facilitate the administration and regulation of title insurance in this state by adopting new rules and forms and by modifying or replacing currently existing rules and forms. The amendments to the Basic Manual clarify and standardize the rules and forms

which regulate title insurance. Section 9.1 was adopted with one change to the text as it was published in the proposal. The effective date of the section as published in the proposal was September 1, 1997, however the effective date as adopted has been changed to October 1, 1997. Item 96-4 was withdrawn by Roland Chamberlin, Jr. at the 1996 Biennial Rule and Form Hearing and, therefore, was not adopted. Item 96-5 as submitted by the Texas Land Title Association (TLTA) was adopted by reference. Item 96-5 as originally submitted by Barton R. Bentley and Roland Chamberlin, Jr. to adopt a new procedural Rule P-9.b (11) authorizing a Downdate Endorsement was amended on March 24, 1997 by a submission by Thomas Rutledge on behalf of Texas Land Title Association (TLTA). The TLTA submission proposed new procedural rule P-43 which specified the requirements that would apply to the issuance of a new Limited Pre-Foreclosure Policy and new Limited Pre-Foreclosure Policy Downdate Endorsement. The TLTA proposal for new Procedural Rule P-43 was adopted. Item 96-6 as submitted by TLTA was adopted by reference. Item 96-6 as originally submitted by Barton R. Bentley and Roland Chamberlin, Jr. proposed a new endorsement form to authorize the issuance of a Downdate Endorsement after the issuance of a Mortgagee Title Policy, by utilizing Endorsement Form T-3 with new endorsement instructions to be added as a new Section IX. On March 21, 1997, Item 96-6 was amended by a submission by Thomas Rutledge on behalf of TLTA. The TLTA submission amends Section II of the Basic Manual, Insuring Forms, by adding a new policy form entitled "Limited Pre-Foreclosure Policy" and by adding a new endorsement form entitled "Limited Pre-Foreclosure Policy Downdate Endorsement." This new policy form and endorsement is necessary to provide new insurance products which will bridge the gap between the date of the original mortgagee's policy and the mortgagee's post-foreclosure ownership period. Item 96-7 was withdrawn by Roland Chamberlin, Jr. at the 1996 Biennial Rule and Form Hearing and, therefore, was not adopted. Item 96-8 was adopted as by reference. Item 96-8 is a submission by the Staff of the Texas Department of Insurance to make four amendments to the Minimum Escrow Accounting Procedures and Internal Controls in Section V of the Basic Manual in order to strengthen accounting controls over trust funds held by the industry. The amendments to Section V are as follows:

1) In Number 6 the word "tickets" is being substituted for the word "slips".

2) In Number 7, new subsection D is being added to require title agents to maintain a control ledger identifying all interest bearing accounts and requiring that the interest be posted to the account within seven days after receipt of the statement or other documentation reporting the interest. This new requirement will take effect 90 days after its adoption in order to allow title agents sufficient time to set up such ledgers. This amendment is needed to require title agents to maintain adequate records for interest bearing accounts.

3) Number 13 is amended to eliminate a duplication of the requirement that trust funds received by escrow agents be deposited within three business days of receipt because this requirement is adequately addressed in Procedural Rule P-27. The amendment also requires written notice to a seller within seven days in the event an earnest money check is returned to the escrow agent due to insufficient funds. This amendment is necessary to address the problems that have arisen in cases where a title agent failed to promptly notify a seller when the earnest money check was dishonored by the bank due to insufficient funds.

4) Number 15 is amended to add a requirement that voided checks must be shown on the disbursement sheet if the funds were credited back to the account. This amendment is needed to provide a more complete audit trail. Item 96-9 was adopted by reference. Item 96-9 is a submission by the Staff of the Texas Department of Insurance to amend Procedural Rule P-27 concerning disbursement from trust fund accounts. P-27 subsection a. 7. is amended to include checks drawn on "savings banks" and delete references to FSLIC and the Texas Share Guaranty Credit Union which are entities that no longer exists. P-27 subsection b. is further amended to require that good funds received by a trustee must be deposited within three days after they are received rather than three days after closing unless the trustee is given express written instructions signed by the buyer and seller to postpone depositing the funds for a time period longer than three days. These amendments to P-27 also more specifically define business day to be consistent with federal banking regulations and further reflect the cessation of the FSLIC and The Texas Share Guaranty Credit Union.

Item 96-10 was adopted by reference. Item 96-10 is a submission by Staff that adopts a distinct form number designation for each promulgated form in the Basic Manual. The new form numbers are to be fully implemented within six months. This amendment promotes standardization of the Basic Manual. Reference to a form by a unique number alleviates confusion when referring to forms with similar names. Item 96-11 was adopted by reference. Item 96-11 is a submission by Staff that amends Procedural Rules P-1, P-11, and P-38. Procedural Rule P-1 e. is amended to add the language "or other title insurance form." Procedural Rule P-1 l. is amended by adding the language "conducting the business of title insurance" and deleting the language "insuring titles to real property." Procedural Rule P-1 q. is amended to add language to broaden the definition of "the business of title insurance" to prevent business entities that are not licensed title agents from offering products that closely resemble title insurance. Procedural Rule P-11 is amended to clarify the definition of "insuring around" as the willful issuance of a title binder or policy showing no outstanding enforceable recorded liens when a title agent has determined through examination of title that there are valid and enforceable liens of record. Procedural Rule P-38 is amended to provide for the issuance of a Residential Owner Policy of Title Insurance (From T-1R) to a natural person prior to the construction of improvements, if the contemplated improvements meet the definition of residential property. This change is needed because under the existing rules there is an inconsistency which requires a purchaser of unimproved property, who anticipates immediate construction of a residence, to be issued the incorrect Owner Policy of Title Insurance (Form T-1). The amendments to P-1, P-11, and P-38 were all required to conform these rules to the statutory changes made to Articles 9.02, 9.07A, and 9.08 by Senate Bill 1284. Item 96-12 was adopted by reference. Item 96-12 withdraws all of the Bulletins contained in Section VI of the Basic Manual. Certain Bulletins that continue to have some historical importance will be maintained in an appendix for reference purposes. Bulletins which are deemed to no longer

have any applicability are repealed and will not be maintained in the proposed appendix. Upon withdrawal of the Bulletins contained in Section VI of the Basic Manual, Section VII will be redesignated as Section VI and Section VIII will be redesignated as Section VII. These changes are necessary because many references in the Bulletins are out of date because they refer to statutes that are no longer in effect or which have been greatly modified or deal with practices and procedures which have been changed by actions of the Board or Commissioner over the years. Item 96-13 was adopted by reference. Item 96-13 withdraws four forms in Section V of the Basic Manual because they are out of date and have been superseded by more current forms. The following forms are withdrawn from Section V of the Basic Manual: 1)Acknowledgment of Notice of Appointment/Notice of Cancellation of Appointment Form 108 2)Texas Title Insurance Agent's License Form 3) Notice of Appointment Cancellation of Title Insurance Agent 4) Notice of Appointment Cancellation of Title Insurance Escrow Officer. Item 96-14 was adopted by reference. Item 96-14 amends the Arbitration Provisions in Procedural Rule P-36, Owner Policy of Title Insurance (Form T-1), Mortgagee Policy of Title of Insurance (Form T-2), and Commitment for Title Insurance form to provide consistency in punctuation, spelling, and grammar and correct typographical errors in previous amendments to the rule and forms, and to amend the Commitment for Title Insurance form Schedule B, entitled Exceptions From Coverage, to correct an omission of the words "is furnished" in exception number 7 and to amend the forms for the Mortgagee Title Policy on Interim Construction Loan and the Immediately Available Funds Procedure Agreement, and Rate Rules R-1 and R-8 to reflect the elimination of the State Board of Insurance. Items 96-4 through 96-14 are incorporated by reference for all purposes.

Amended §9.1 incorporates by reference certain amendments to the Basic Manual which the Commissioner considered as individual items at the biennial hearing on March 25, 1997. Item 96-4 was not adopted and will receive no further consideration. Item 96-5 adopts new Procedural Rule P-43 which specifies the requirements that apply to the issuance of a new Limited Pre-Foreclosure Policy and new Limited Pre-Foreclosure Policy Downdate Endorsement. Item 96-6 amends Section II of the Basic Manual, Insuring Forms, to add a new Limited Pre-Foreclosure Policy and new Downdate Endorsement. Item 96-7 was not adopted and will receive no further consideration. Item 96-8 amends the Minimum Escrow Accounting Procedures and Internal Controls in Section V of the Basic Manual in order to strengthen accounting controls over trust funds held by the industry. Item 96-9 amends Procedural Rule P-27 to require that good funds received by the trustee must be deposited within three business days after they are received unless the trustee is given express written instructions signed by the buyer and seller to postpone depositing the funds for a time period longer than three days. Item 96-10 adopts a distinct form number designation for each promulgated form in the Basic Manual to alleviate confusion when referring to forms with similar names. Item 96-11 amends Procedural Rules P-1, P-11, and P-38 to conform these rules to the statutory changes made to Articles 9.02, 9.07A, and 9.08 by Senate Bill 1284. Item 96-12 repeals the out of date bulletins in the Basic Manual and retains in an appendix only those bulletins that continue to have some historical importance. Item 96-13 withdraws four forms in Section V of the Basic Manual which are out of date and have been superseded by more current forms. Item 96-14 amends the Arbitration Provisions in Procedural Rule P-36, Owner Policy of Title Insurance (Form T-1), Mortgagee Policy of Title Insurance (Form T-2), and Commitment for Title Insurance form to provide consistency in punctuation, spelling, and grammar and correct typographical errors in previous amendments to the rule and forms, and to amend the Commitment for Title Insurance form Schedule B, entitled Exceptions From Coverage to correct an omission of language in exception number 7 and to amend certain insuring forms and Rate Rules R-1 and R-8 to reflect the elimination of the State Board of Insurance.

No comments were received regarding adoption of the amendment.

This section is adopted under the Insurance Code, Articles 1.02, 9.07, and 9.21; and the Government Code, §§2001.004, et. seq. Article 1.02 provides that a reference in the Insurance Code or another insurance law to the State Board of Insurance means the Commissioner of Insurance or the Texas Department of Insurance as consistent with the respective powers and duties of the Commissioner and the Department under Article 1.02. Article 9.07 authorizes and requires the Commissioner to hold a biennial hearing to promulgate or approve rules and policy forms of title insurance and otherwise to provide for the regulation of the business of title insurance. Article 9.21 authorizes the Commissioner to promulgate and enforce rules and regulations prescribing underwriting standards and practices, and to promulgate and enforce all other rules and regulations necessary to accomplish the purposes of Chapter 9, concerning regulation of title insurance. The Government Code, §§2001.004-2001.038 (Administrative Procedures Act), authorize and require each state agency to adopt rules of practice stating the nature and requirements of available procedures and prescribe the procedures for adoption of rules by a state administrative agency.

The following articles are affected by this proposal: Articles 9.07 and 9.21.

§9.1. Basic Manual of Rules, Rates, and Forms for the Writing of Title Insurance in the State of Texas.

The Texas Department of Insurance adopts by reference the Basic Manual of Rules, Rates, and Forms for the Writing of Title Insurance in the State of Texas, as amended effective October 1, 1997. The document is published by and available from Hart Information Services, 11500 Metric Boulevard, Austin, Texas 78758, and is available from and on file at the Texas Department of Insurance, Title Insurance Section, MC 103-1T, 333 Guadalupe Street, Austin, Texas 78701-1998.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711316
Caroline Scott
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: October 1, 1997
Proposal publication date: June 27,1997

For further information, please call: (512) 463–6327

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part X. Texas Water Development Board

Chapter 371. Drinking Water State Revolving Fund

Program Requirements

31 TAC §371.20, §371.21

The Texas Water Development Board (board) adopts amendments to §371.20 and §371.21, concerning the Drinking Water State Revolving Fund without changes to the proposed text as published in the July 15, 1997,*Texas Register* (22 TexReg 6551).

The amendments support a new distribution of funds by soliciting applications only for the total amount of funds available, rather than two times the amount of funds available, as authorized by the current rules. The amendments are proposed in response to comments from the United States Environmental Protection Agency.

No comments were received regarding adoption of the amendments.

The amendments are adopted under the authority of the Texas Water Code, §6.101 and §15.605 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and specifically the SRF programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 21, 1997.

TRD-9711049
Craig D. Pedersen
Executive Administrator
Texas Water Development Board
Effective date: September 10, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 463–7981

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TITLE 34. PUBLIC FINANCE

Part IV. Employees Retirement System

Chapter 71. Creditable Service

34 TAC §§71.3, 71.14, 71.17

The Employees Retirement System of Texas (ERS) adopts amendments to §71.3, concerning service credit for members of the elective class, §71.14, concerning payments to establish or reestablish service credit, and §71.17, concerning credit for unused accumulated sick leave, without changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6553).

These rules are being amended to add features that will enhance employee benefits and help the state continue to attract qualified employees.

These rules will provide state employees with more flexibility in purchasing service.

No comments were received regarding adoption of these amendments.

The amendments are adopted under the Government Code §815.102, which provides that the Board of Trustees may adopt rules for the transaction of any business of the Board and §813.104, which provides for alternative payments to establish or reestablish service credit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711198
Shelia W. Beckett
Executive Director
Employees Retirement System
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 867–3336

♦ ♦ ♦

34 TAC §71.10

The Employees Retirement System of Texas (ERS), adopts the repeal of §71.10, concerning the purchase of military service credit, without changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6554).

This rule is being repealed as a result of changes made in Senate Bill 1102, 75th Texas Legislature.

The repeal of this rule will allow partial month purchase of military service credit in accordance with Senate Bill 1102.

No comments were received regarding the proposed repeal of this rule.

The repeal is adopted under Government Code §815.102, which provides that the Board of Trustees may adopt rules for the transaction of any business of the Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711200
Shelia W. Beckett
Executive Director
Employees Retirement System
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 867–3336

♦ ♦ ♦

34 TAC §71.25

The Employees Retirement System of Texas (ERS) adopts new rule §71.25, concerning eligibility for service credit previously canceled, without changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6554).

This new rule will provide more efficient administration of the retirement system.

This new rule allows eligible former members the ability to establish service credit that was previously canceled.

No comments were received regarding adoption of the new rule.

The new rule is adopted under Government Code §815.102, which provides that the Board of Trustees may adopt rules for the transaction of any business of the Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711199
Shelia W. Beckett
Executive Director
Employees Retirement System
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 867–3336

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Chapter 73. Benefits

34 TAC §§73.13, 73.25, 73.31, 73.35

The Employees Retirement System of Texas (ERS) adopts amendments to §73.13 concerning proportionate retirement under programs administered by the Board, §73.25 concerning payments to an estate, §73.31 concerning adjustments to annuities, and §73.35 concerning supplemental payments, without changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6555).

These rules will provide enhanced services and benefits for state employees and retirees.

No comments were received regarding adoption of these amendments.

The amendments are adopted under the Government Code §803.401, which provides that the Board of Trustees may adopt rules necessary to implement the proportionate retirement program; §814.602, which provides that the Board of Trustees may adopt rules that adjust or modify annuities as necessary to be consistent with changes in plan design; §814.603, which authorizes the retirement system to make a supplemental payment in addition to the regular monthly annuity; and §815.102, which provides that the Board of Trustees may adopt rules for the transaction of any business of the Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711201
Shelia W. Beckett
Executive Director
Employees Retirement System
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 867–3336

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34 TAC §73.27

The Employees Retirement System of Texas (ERS), adopts the repeal of §73.27, concerning the percentage value of a member's first 10 years of service, without changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6555).

The rule is being repealed as a result of changes made in Senate Bill 1102, 75th Texas Legislature.

The repeal of this rule will result in the ERS not enforcing an obsolete rule.

No comments were received regarding repeal of this rule.

The repeal is adopted under Government Code §815.102, which provides that the Board of Trustees may adopt rules for the transaction of any business of the Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711203
Shelia W. Beckett
Executive Director
Employees Retirement System
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 867–3336

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34 TAC §73.41

The Employees Retirement System of Texas (ERS) adopts new rule §73.41, concerning privatization or other reduction in workforce temporary service retirement option, with changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6556). The changes were necessary in order to correct a grammatical error and to provide clarification of the new rule.

The new rule provides guidelines for privitization or other reduction in workforce.

This new rule will provide for the efficient privatization of certain state employees and provide a temporary service retirement option.

No comments were received regarding the adoption of this new rule.

The new rule is adopted under Government Code §815.102, which provides that the Board of Trustees may adopt rules for the transaction of any business of the Board.

§73.41. Privatization or Other Reduction in Workforce Temporary Service Retirement Option.

(a) The purpose of this section is to implement the Government Code, Title 8, §814.1041, concerning employee class positions that, between September 1, 1997 and August 31, 1999, are eliminated as a result of privatization or the reduction in services provided by the Texas Workforce Commission, the Texas Department of Human Services, and the Texas Department of Mental Health and Mental Retardation, hereinafter referred to as "agency". Separations that do not result in the elimination of the position because of privatization or a reduction in service are not subject to the provisions of this section.

(b) The agency shall provide the Employees Retirement System of Texas (ERS) as soon as practicable after September 30, 1997 and September 30, 1998, respectively, the identification of each individual subject to the provisions of this section. Not less than 30 days prior to the actual effective date of separation, the agency shall provide the ERS, on a form prescribed by the ERS, certification of the member's separation as a result of the position elimination through privatization or other reduction in service. Upon receipt of the certification, the ERS shall determine the member's eligibility for benefits under §814.1041.

(c) To be eligible for benefits under §814.1041(b) or §814.1041(c), the member's age and service at the time of separation, including, if eligible, credit for unused accrued sick leave, transferred service, or service purchased, must not otherwise qualify the member for service retirement benefits. The eligibility date for benefits under §814.1041(b) is the end of the month in which separation of state employment occurs. The eligibility date for benefits under §814.1041(c) is the end of the month in which the member's age and service combination under the provisions of this section meet the requirement for service retirement under §814.104(a). An eligible member who is subsequently reemployed with the state prior to the retirement eligibility date under §814.1041(c), may use only the time between the period of separation and reemployment for purposes of meeting eligibility for service retirement benefits. Failure to retire upon first eligibility under this section will result in cancellation of the member's right to benefits under this section. Service creditable under § 814.1041(b) for age and service shall be in equal increments not to exceed the maximum of three years of service and three years of age. For a member retiring under the provisions of §814.104(a)(1), only the amount of age or service credit needed for eligibility shall be added.

(d) The provisions of this section apply only to service retirements under the Government Code, Subtitle B.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711202
Shelia W. Beckett
Executive Director
Employees Retirement System
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 867–3336

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Chapter 75. Hazardous Profession Death Benefits

34 TAC §75.1

The Employees Retirement System of Texas (ERS) adopts amendments to §75.1, concerning the filing of claims for hazardous profession death benefits, without changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6556).

This rule is a result of recent recodification of the pertinent statutes.

This rule will result in the accurate citation of the statutes governing this program.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Government Code §615.002, which provides that the Board of Trustees shall administer this chapter under rules adopted by the Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711204
Shelia W. Beckett
Executive Director
Employees Retirement System
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 867–3336

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Chapter 77. Judicial Retirement

34 TAC §77.15

The Employees Retirement System of Texas (ERS) adopts amendment to §77.15, concerning payments to establish or reestablish service credit, with changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6557). One administrative change was made to correct a grammatical error.

This rule will provide members of the Judicial Retirement System of Texas with more flexibility in purchasing service.

No comments were received regarding adoption of the amendments.

The amendment is adopted under Government Code §838.105, which provides authority for the Board of Trustees to make alternative payments to establish or reestablish service credit.

§77.15. Payments to Establish or Reestablish Service Credit.

(a) A member or contributing member of the Judicial Retirement System of Texas Plan One or Plan Two may purchase eligible

service creditable in the member's respective retirement system in accordance with the Government Code, Chapter 833 and Chapter 838, respectively. The retirement system shall grant the applicable amount of service credit after each payment made under this section is equal to the amount required to establish one or more months of creditable service.

(b) (No change.)

(c) A contributing member of the Judicial Retirement System of Texas Plan One or Plan Two may file with the member's state payroll officer, a contract to establish or reestablish service credit through a monthly payroll deduction installment plan. The state agency shall provide the Employees Retirement System of Texas (ERS) a signed copy of the contract not later than the date the service purchase contribution is reported to the ERS. Plan Two members with payroll deductions that will result in less than the amount required to establish one month of creditable service by fiscal year end will be provided written notice at the time the contract is received by the ERS, that a balloon payment will be due at fiscal year end; otherwise additional penalty interest will accrue on the service cost.

(d) The contributing member shall designate the amount to be deducted from the member's salary and deposited each month with the ERS. The total amount deducted in any one fiscal year must equal or exceed the cost to establish one month of service credit. Excess payments of $5.00 or greater will be applied to the next fiscal year service purchase contract, if eligible. In the event the member does not negotiate a new contract within 60 days of a new fiscal year or there is no remaining service for purchase, any overpayment of $5.00 or greater will be refunded to the member. Any remaining credit of less than $5.00 for Plan One members will be deposited to the retirement system's state accumulation account and will not be subject to refund. Any remaining credit of less than $5.00 for Plan Two members will be deposited as penalty interest toward the last purchase established and will not be subject to refund.

(e)-(f) (No change.)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711205
Shelia W. Beckett
Executive Director
Employees Retirement System
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 867–3336

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34 TAC §77.19

The Employees Retirement System of Texas (ERS) adopts new rule §77.19, concerning acceptance of rollovers and transfers from other qualified, without changes to the proposed text as published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6558).

This rule contains a new plan design feature which will enhance the fringe benefits available to judicial members and help the state to continue to attract qualified judicial candidates.

This new rule will allow Judicial Retirement System Plan Two member to purchase eligible service credit using a procedure not previously available.

No comments were received regarding adoption of the new rule.

The new rule is adopted under Government Code §840.002, which provides that the Board of Trustees may adopt rules for the administration of the funds of the retirement system.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711206
Shelia W. Beckett
Executive Director
Employees Retirement System
Effective date: September 15, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 867–3336

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part I. Texas Department of Public Safety

Chapter 23. Vehicle Inspection

Vehicle Emissions Inspection and Maintenance Program

37 TAC §23.93

The Texas Department of Public Safety adopts an amendment to §23.93, concerning vehicle emissions inspections, without changes to the proposed text as published in the June 17, 1997, issue of the *Texas Register* (22 TexReg 5816).

The justification for this section will be improved air quality by the reduction of emissions of hydrocarbons, carbon monoxide, and other pollutants from mobile sources.

Subsection (n) is amended to include the adoption by reference of the VEHICLE EMISSIONS INSPECTION AND MAINTENANCE RULES AND REGULATIONS MANUAL FOR OFFICIAL VEHICLE INSPECTION STATIONS AND CERTIFIED INSPECTORS as the standard for conducting emissions inspections in designated counties.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to Texas Government Code, §411.006(4), which provides the director with the authority to adopt rules, subject to commission approval, considered necessary for the control of the department.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 14, 1997.

TRD-9711026
Dudley M. Thomas
Director
Texas Department of Public Safety
Effective date: September 9, 1997
Proposal publication date: June 17, 1997
For further information, please call: (512) 424–2890

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 46. Licensed Personal Care Facilities

Contracting with the Texas Department of Human Services to Provide Residential Care Services

The Texas Department of Human Services (DHS) adopts an amendment to §46.2005, and adopts new §§46.8001-46.8003, without changes to the proposed text published in the July 15, 1997, issue of the *Texas Register* (22 TexReg 6560). New §§46.8001-46.8003 are adopted in a new undesignated head titled "Administrative and Financial Errors."

The justification for the proposal is to add rules concerning administrative and financial errors, which will allow DHS to recoup overpayments made to the provider agencies. These sections also apply to Community Based Alternatives (CBA) assisted living and residential care providers.

The sections will function by allowing DHS to recoup monies erroneously paid to provider agencies.

No comments were received regarding adoption of the sections.

Provider Participation

40 TAC §46.2005

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs and under Texas Government Code, §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The amendment implements the Human Resources Code, §§22.001-22.030 and 32.001-32.041.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711235
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 16, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 438–3765

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Administrative and Financial Errors

40 TAC §§46.8001–46.8003

The new sections are adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which provides the department with the authority to administer public and medical assistance programs and under Texas Government Code, §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new sections implement the Human Resources Code, §§22.001-22.030 and 32.001-32.041.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711236
Glenn Scott
General Counsel, Legal Services
Texas Department of Human Services
Effective date: September 16, 1997
Proposal publication date: July 15, 1997
For further information, please call: (512) 438–3765

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TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on. Multiple graphics in a rule are designated as "Figure 1" followed by the TAC citation, "Figure 2" followed by the TAC citation.

Graphic Material will not be reproduced in the Acrobat version of this issue of the *Texas Register* due to the large volume. To obtain a copy of the material please contact the Texas Register office at (512) 463-5561 or (800) 226-7199.

OPEN MEETINGS

Agencies with statewide jurisdiction must give at least seven days notice before an impending meeting. Institutions of higher education or political subdivisions covering all or part of four or more counties (regional agencies) must post notice at least 72 hours before a scheduled meeting time. Some notices may be received too late to be published before the meeting is held, but all notices are published in the ***Texas Register***.

Emergency meetings and agendas. Any of the governmental entities listed above must have notice of an emergency meeting, an emergency revision to an agenda, and the reason for such emergency posted for at least two hours before the meeting is convened. All emergency meeting notices filed by governmental agencies will be published.

Posting of open meeting notices. All notices are posted on the bulletin board at the main office of the Secretary of State in lobby of the James Earl Rudder Building, 1019 Brazos, Austin. These notices may contain a more detailed agenda than what is published in the ***Texas Register***.

Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have an equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting summary several days prior to the meeting by mail, telephone, or RELAY Texas (1-800-735-2989).

Texas Department on Aging (TDoA)

Wednesday, September 10, 1997, 1:00 p.m.

4900 North Lamar Boulevard, Room 4501

Austin

Planning Committee

AGENDA: Consider and possibly act on:

A. Call to order

B. Overview of planning process and purpose of Planning Committee

C. Review and discuss *Signs of the Times*

D. Discuss planning issues

E. Review next steps and meeting dates

F. Adjourn

Contact: Mary Sapp, P.O. Box 12786, Austin, Texas 78756, (512) 424–6840.
Filed: August 28, 1997, 8:19 a.m.

TRD-9711374

♦ ♦ ♦

Texas Commission on Alcohol and Drug Abuse (TCADA)

Monday, September 8, 1997, 1:00 p.m.

7271 Wurzback, Suite 220, The University of Texas Health Science Center, Community Pediatrics/Medical Center Plaza

San Antonio

Regional Advisory Consortium, (RAC), Region 8

AGENDA:

Call to order; welcome and introduction of guests; TCADA update and comments; membership issues; statewide services delivery plan meeting; old business; new business; public comment; and adjournment.

Contact: Heather Harris, 9001 North IH35, Suite 105, Austin, Texas 78753, (512) 349–6669.
Filed: August 28, 1997, 8:19 a.m.

TRD-9711373

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The State Bar of Texas

Friday, September 12–13, 1997, 1:00 p.m. and 9:00 a.m. respectively.

The San Luis Resort and Conference Center, 5222 Seawall Boulevard

Galveston

Board of Directors

AGENDA:

Call to order/Roll call/Invocation/Swearing in of new director/ Consider approval of items on the consent Agenda/Select candidates for 1998–99 Chair of the Board/Review and take appropriate action on items presented by: President; President-Elect, Executive Director, Supreme Court Liaison, Commission for Lawyer Discipline, and General Counsel [CLOSED SESSION: consider approval to revisit a motion approved at the June 26, 1997 Board meeting, discussion of potential and/or pending litigation. End CLOSED SESSION/ return to OPEN SESSION/Review and take appropriate action on items discussed in closed session/Review and take appropriate action on items presented by: board committees (General Counsel Oversight, Grant Review, Legal Services, Long Range Planning, Judicial Poll Resolution, and Ad Hoc Section Study) and State Bar Committee (Federal Judiciary Relations/Reports from : Immediate Past President, TYLA President, Court of Criminal Appeals Liaison, Federal Judicial Liaison, Judicial Section Liaison, and Out-of-State Lawyer Liaison/Public comment/Adjourn.

Contact: Pat Hiller, P.O. Box 12487, Austin, Texas 78711, 1–800–204–2222.
Filed: August 29, 1997, 9:43 a.m.

TRD-9711447

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Friday, September 12, 1997, 8:30 a.m.

The San Luis Resort and Conference Center, 5222 Seawall Boulevard

Galveston

The Texas Commission for Lawyer Discipline

AGENDA:

PUBLIC SESSION: Call to order/Introductions/Swearing-in of New Commission members/Approve Minutes.

CLOSED SESSION: Discuss appropriate action with respect to pending evidentiary cases; pending and potential litigation; special counsel assignments; and the performance of the General counsel/ Chief Disciplinary Counsel and staff.

PUBLIC SESSION: Discuss and authorize General Counsel to make, accept or reject offers or take other appropriate action with respect to pending or potential litigation matters/Review and take appropriate action on those matters discussed in closed session/ Review and discuss the outcome of recent disciplinary trials/Report of Chief Disciplinary Counsel on those matters unresolved in prior meetings requiring additional information and take appropriate action, if any/Review, discuss and take appropriate action on: statistical and status reports of pending cases; the Commission's compliance with governing rules; reports concerning the state of the attorney disciplinary system and recommendations for refinement; budget and operations of the Commission and the General Counsel's Office; matters concerning district grievance committees; the Special Counsel Program and recruitment of volunteers/Discuss issues affecting the attorney discipline and disability system with members of the State Bar's leadership and others/Discuss future meetings/Discuss other matters as appropriately come before the Commission/Public comment/Adjourn.

Contact: Anne McKenna, P.O. Box 12487, Austin, Texas 78711, 1–800–204–2222.
Filed: August 29, 1997, 9:44 a.m.

TRD-9711448

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Texas Bond Review Board

Tuesday, September 9, 1997, 10:00 a.m.

Clements Building, Committee Room #5, 300 West 15th Street

Austin

Planning Session

AGENDA:

I. Call to order

II. Approval of minutes

III. Discussion of proposed issues

A. Texas Water Development Board-State Revolving Fund Senior Lien Revenue Bonds, Program Series 1997–Amendment to previous approval

B. Higher Education Coordinating Board-College Student Loan Bonds, Series 1997

IV. Discussion of Pending Issues

A. Texas Department of Housing and Community Affairs-Multifamily Revenue Bonds (FHA-Insured Mortgage Loan-Windcrest Crossing Apartments) Series 1997 (pending from August meeting)

B. General Services Commission-amendment of existing Lease with option to purchase agreements for office space 1997 (pending from August meeting)

V. Other Business

VI. Adjourn

Contact: Albert L. Bacarisse, 300 West 15th Street, Suite 409, Austin, Texas 78701, (512) 463–1741.
Filed: August 29, 1997, 9:42 a.m.

TRD-9711445

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Texas Board of Chiropractor Examiners

Thursday, September 11, 1997, 8:30 a.m.

333 Guadalupe, Tower III, Suite 825

Austin

Licensure and Educational Standards Committee

AGENDA:

The Licensure and Educational Standards Committee of the Texas Board of Chiropractor Examiners will meet on Thursday, September 11, 1997 to meet on the following items:

B.1. Discussion of repeal of ability to take jurisprudence examination prior to graduation from Chiropractor College.

B.2. Discussion of guidelines to establish a limit on number of years in past you may have failed the Board exam to be eligible to reciprocate.

B.3. Ratification of results of August 7, 1997, Jurisprudence exam.

B.4. Revision to jurisprudence examination

B.5. Request for reinstatement of terminated license: Martin Andreis, D.C.

B.6. Reconsideration of request for provisional licensure: Raymond Wiegand, D.C.

B.7. Request for written approval of correspondence course in Public Health in lieu of chiropractic college course passed with a "D" by Stavros Mento, D.C.

B.8. Request for reinstatement of retired license: Mary B. Anderson, D.C.

B.9. Request for a waiver of continuing education hours: R.G. Raines, D.C.

B.10. Request for reinstatement of terminated license: Jaime Morales, D.C.

B.11 Establish guidelines for pre-chiropractic education.

B.12. Approval of 1998–1999 license renewal form.

Contact: Joyce Kershner, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, (512) 305–6700.
Filed: August 27, 1997, 2:44 p.m.

TRD-9711363

♦ ♦ ♦

Thursday, September 11, 1997, 9:30 a.m.

333 Guadalupe, Tower III, Suite 825

Austin

Enforcement Committee

AGENDA:

The Enforcement Committee of the Texas Board of Chiropractor Examiners will meet on Thursday, September 11, 1997 at 9:30 a.m. to consider, discuss and take any appropriate action on:

A.1 Enforcement Action September 1, 1997– August 31, 1997

A.2 Cases #94–19, 95–5, 95–6, 95–8, 95–9, 95–10, 95–11, 95–191, 96–126, 96–238, 97–62, 97–70, 97–71 through 97–210.

Contact: Joyce Kershner, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, (512) 305–6700.
Filed: August 27, 1997, 2:44 p.m.

TRD-9711364

♦ ♦ ♦

Thursday, September 11, 1997, 9:30 a.m.

333 Guadalupe, Tower III, Suite 825

Austin

Technical Standards Committee/Dr. Vaughn

AGENDA:

The Technical Standards Committee of the Texas Board of Chiropractor Examiners will meet on Thursday, September 11, 1997 at 9:30 a.m. to meet on the following items:

E.1. Acupuncture: Guidelines

E.2. Manipulation Under Anesthesia: Guidelines

E.3. Needle EMGs: Guidelines

E.4. Solicitation

E.5. Practice of needle acupuncture: Rick Tillman, D.C., Alan Bonebrake, D.C.

E.6. Auriculotherapy without needle insertion: G.L. Brettmann, D.C.

E.7. Injectable nutrients or vitamins/medical records: Kenneth McWilliams, D.C.

E.8. Work harding/work conditioning programs: Brian Lee Day, D.C.

E.9. Acupuncture; legal October 1995 and September 1996: Donna T. Brown

E.10. Pre-pay plans: Michael K. Shanks, D.C.

Contact: Joyce Kershner, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, (512) 305–6700.
Filed: August 27, 1997, 2:44 p.m.

TRD-9711361

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Thursday, September 11, 1997, 10:30 a.m.

333 Guadalupe, Tower III, Suite 825

Austin

Executive Committee

AGENDA:

The Executive Committee of the Texas Board of Chiropractor Examiners will meet on Thursday, September 11, 1997 to consider the following items:

C.1 Report on Search for Executive Director

C.1. Performance evaluation for staff

C.3. Consideration and approval of: 1998 Meeting Dates

January 8, 1997 — Thursday.

March 6, 1998 — Friday

May 7, 1998 — Thursday

July 10, 1998 — Friday

September 10, 1998 — Thursday

November 6, 1998 — Friday

Contact: Joyce Kershner, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, (512) 305–6700.
Filed: August 27, 1997, 2:44 p.m.

TRD-9711362

♦ ♦ ♦

Thursday, September 11, 1997, 1:30 p.m.

333 Guadalupe, Tower III, Suite 825

Austin

Board Meeting

AGENDA:

The Texas Board of Chiropractor Examiners will meet on Thursday, September 11, 1997 at 1:30 to consider, discuss and take any appropriate action, and/or approve: I. Minutes of the July 11, 1997 Board Meeting; II. Report of the President on Board activities since the last Board meeting; III. Committee Reports: A. Enforcement Committee Report — 1. Enforcement Actions September 1, 1996–August 31, 1997. 2. Cases #94–19, 95–5, 95–6, 95–8, 95–9, 95–10, 95–11, 95–191, 96–126, 96–238, 97–62, 97–70, 97–71 through 97–210; B. Licensure and Educational Standards Committee: 1. Discussion of repeal of ability to take jurisprudence examination prior to graduation from Chiropractor College, 2. Discussion of guidelines to establish a limit on number of years in past you have failed the Board exam to be eligible to reciprocate, 3. Ratification of results of August 7, 1997 jurisprudence exam, 4. Revision to jurisprudence examination. 5. Request for reinstatement of terminated license: Martin Anders, D.C., 6. Reconsideration of request for provisional license: Raymond Legend, D.C. 7. Request for written approval of correspondence course in Public Health in lieu of chiropractic college

course passed with a "D"; Stavros Mento, D.C., 8. Request for reinstatement of retired license; Mary B. Anderson, D.C., 9. Request for waiver of continuing education hours; ARC Airiness, D.C., 10. Request for reinstatement of terminated license; Jaime Morales, D.C., 11. Establish guidelines for pre-chiropractic education, 12. Approval of 1998–1999 license renewal form; C. Executive Committee — 1. Search for Executive Director, 2. Performance Evaluation for staff, 3. Consideration and approval of: 1998 Meeting Dates, January 8, 1998–Thursday, March 6, 1998 — Friday, May 7, 1998 — Thursday, July 10, 1998 — Friday, September 10, 1998 — Thursday, November 6, 1998 — Friday; D. Report from Peer Review Committee — 1. Appointments to Peer Review Committee; E. Technical Standards Committee — 1. Acupuncture: Guidelines, 2. Manipulation Under Anesthesia: guidelines, 3. Needle EMGs: Guidelines, 4. Solicitation, Practice of needle acupuncture: Rick Tillman, D.C. Alan Bonebrake, D.C. , 6. Auriculotherapy without needle insertion: G.L Brettman, D.C., 7. Injectable nutrients or vitamins/medical records: Kenneth McWilliams, D.C., Eric K. Cerre, D.C., Phillip E. Snowden, D.C. 8. Work hardening/work conditioning programs: Brian Lee Day, D.C., 9. Acupuncture; legal October 1995 and September 1996: Donna T. Brown; 10. Pre-pay plans: Michael K. Shanks, D.C.; Rules Committee — 1. Needle EMGs, 2. Manipulation Under Anesthesia, 3. Acupuncture, 4. Proposed amendments to 22 TAC §73.3, relating to continuing education; video option, 5. Proposed amendments to 22 TAC §73.3, relating to continuing education: board courses. 6. Proposed amendments to 22 TAC §79.1, relating to provisional licensure: G. Election of Texas Board of Chiropractor Examiners Officers/Representatives — 1. Vice-President, 2. Secretary-Treasurer, 3. Representatives to Federation of Chiropractor Licensing Boards; H. Appointment to Advisory Commission: Items to be considered for future agenda.

Contact: Joyce Kershner, 333 Guadalupe, Tower III, Suite 825, Austin, Texas 78701, (512) 305–6700.
Filed: August 27, 1997, 2:45 p.m.

TRD-9711365

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Office of Court Administration

Wednesday, September 17, 1997, 9:30 a.m.

Texas Law Center, 1414 Colorado Street

Austin

Judicial Committee on Informational Technology

AGENDA:

9:30 a.m. — Call Meeting to Order

1. Committee Instructions.

2. Discussion of Committee Objectives and Goals

3. Review Senate Bill 1417 and Final Report of Task Force on Information Technology for the Texas Commission for Judicial Efficiency.

4. Summary of Judicial Information Technology Committees in other states.

5. Role of Committee, Office of Court Administration, and other Texas Agencies

6. Current Status of Texas Court Information Technology

7. Committee Tasks

8. Clarification of Subcommittees

9. Committee meeting schedule

10. New Business

11. Public Comment

2:00 p.m. — Adjourn

Contact: Doug Rybacki, P.O. Box 12066, Austin, Texas 78711–2066, (512) 463–1625.
Filed: August 26, 1997, 2:49 p.m.

TRD-9711292

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Texas Department of Criminal Justice

Thursday, September 11, 1997, 1:30 p.m.

Hutchins State Jail, 1500 East Langdon Road

Dallas

Judicial Advisory Council

AGENDA:

Special Recognition Committee

1. Award Selection Process

Persons with disabilities who plan to attend this meeting and who need auxiliary aids or services as interpreters for persons who are dear or hearing impaired, readers, large print or Braille, are required to contact the agency prior to the meeting so that appropriate arrangements can be made.

Contact: Lois A. Warncke, P.O. Box 13084, Austin, Texas 78711, (512) 305–9323
Filed: August 26, 1997, 4:01 p.m.

TRD-9711299

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Thursday, September 11, 1997, 1:45 p.m.

Hutchins State Jail, 1500 East Langdon Road

Dallas

Judicial Advisory Council

AGENDA:

Program Services Committee

1. Substance Abuse Beds

Persons with disabilities who plan to attend this meeting and who need auxiliary aids or services as interpreters for persons who are dear or hearing impaired, readers, large print or Braille, are required to contact the agency prior to the meeting so that appropriate arrangements can be made.

Contact: Lois A. Warncke, P.O. Box 13084, Austin, Texas 78711, (512) 305–9323.
Filed: August 26, 1997, 4:01 p.m.

TRD-9711300

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Thursday, September 11, 1997, 2:15 p.m.

Hutchins State Jail, 1500 East Langdon Road

Dallas

Judicial Advisory Council

AGENDA:

Field Services Committee

1. Standards

Persons with disabilities who plan to attend this meeting and who need auxiliary aids or services as interpreters for persons who are dear or hearing impaired, readers, large print or Braille, are required to contact the agency prior to the meeting so that appropriate arrangements can be made.

Contact: Lois A. Warncke, P.O. Box 13084, Austin, Texas 7871, (512) 305–9323.
Filed: August 26, 1997, 4:01 p.m.

TRD-9711301

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Thursday, September 11, 1997, 2:30 p.m.

Hutchins State Jail, 1500 East Langdon Road

Dallas

Judicial Advisory Council

AGENDA:

Internal Operations Committee

1. Interstate Compact

Persons with disabilities who plan to attend this meeting and who need auxiliary aids or services as interpreters for persons who are dear or hearing impaired, readers, large print or Braille, are required to contact the agency prior to the meeting so that appropriate arrangements can be made.

Contact: Lois A. Warncke, P.O. Box 13084, Austin, Texas 78711, (512) 305–9323.
Filed: August 26, 1997, 4:01 p.m.

TRD-9711302

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Thursday, September 11, 1997, 3:00 p.m.

Hutchins State Jail, 1500 East Langdon Road

Dallas

Judicial Advisory Council

AGENDA:

Legislative Committee

1. Legislation

Persons with disabilities who plan to attend this meeting and who need auxiliary aids or services as interpreters for persons who are dear or hearing impaired, readers, large print or Braille, are required to contact the agency prior to the meeting so that appropriate arrangements can be made.

Contact: Lois A. Warncke, P.O. Box 13084, Austin, Texas 7871, (512) 305–9323.
Filed: August 26, 1997, 4:01 p.m.

TRD-9711303

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Friday, September 12, 1997, 10:00 a.m.

Dawson State Jail, 106 Commerce Street

Dallas

Judicial Advisory Council

AGENDA:

I. Greeting

II. Introduction of Guests

III. Approval of Minutes

IV. Board Liaison

V. Probation Advisory Committee Report

VI. Committee Reports

A. Special Recognition

B. Program Services

C. Field Services

D. Internal Operations

E. Legislative

VII. Division Director's Update

VIII. Council Member's Issues

IX. Next Meeting

X. Adjournment

Persons with disabilities who plan to attend this meeting and who need auxiliary aids or services as interpreters for persons who are dear or hearing impaired, readers, large print or Braille, are required to contact the agency prior to the meeting so that appropriate arrangements can be made.

Contact: Lois A. Warncke, P.O. Box 13084, Austin, Texas 78711, (512) 305–9323.
Filed: August 26, 1997, 4:01 p.m.

TRD-9711304

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Texas Education Agency (TEA)

Monday, September 8, 1997, 10:00 a.m.

Room 1.104, William B. Travis Building, 1701 North Congress Avenue

Austin

Policy Committee on Public Education Information (PCPEI)

AGENDA:

1. Call to Order

2. OLD BUSINESS

Review of Minutes from June 9, 1997 PCPEI Meeting

Texas Education Agency Information System News

NEW BUSINESS

Information Task Force (ITF) Activities for June and August

Coordinating Task Force Discussion

Texas Essential Knowledge and Skills (TEKS) Update

Texas Education Agency Data Approval Committee (TEADAC) Update

Adjourn

Contact: Nancy Vaughan, 1701 North Congress Avenue, Austin, Texas 78711, (512) 463–8110.
Filed: August 25, 1997, 10:47 a.m.

TRD-9711212

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Advisory Commission on State Emergency Communications

Thursday, September 4, 1997, 1:00 p.m.

333 Guadalupe Street, Tower I, Room 1264

Austin

Poison Center Coordinating Committee Meeting

AGENDA:

The Committee Will Call the Meeting to Order and Recognize Guests; Hear Public Comment; Hear Reports, Discuss and take Committee Action, as Necessary; Approval of June 12, 1997 Meeting Minutes; Roundtable; Subcommittee Reports: A. Report of the Education Subcommittee, B. Report of the Medical Directors Subcommittee, C. Report of the Research Subcommittee, D. Report of the Operations Subcommittee; Election of Officers; Senate Bill 388 Working Group Report; AAPCC Network Certification; Outside Funding for Public Education Materials; Thank You Jimmy Ellis; Set Next Meeting Date; Adjourn.

Persons requesting interpreter services for the hearing and speech-impaired should contact Velia Williams at (512) 305–6933 at least two working days prior to the meeting.

Contact: Velia Williams, 333 Guadalupe Street, Austin, Texas 78701, (512) 305–6933.
Filed: August 25, 1997, 12:35 p.m.

TRD-9711225

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Employees Retirement System of Texas

Thursday, September 11, 1997, 1:30 p.m.

18th and Brazos Streets, Auditorium, First Floor

Austin

Group Benefits Advisory Committee

AGENDA:

1. Call to Order

2. Introduction of GBAC Members

3. Recognition of Visitors and Guests

4. Approval of Minutes from the May and August Meeting

5. Announcements/Updates

6. ERS Update

7. Subcommittee Reports

a. Supplemental Coverages

b. Communications

c. Retiree Issues

d. Trends/Benefit Plan Design

e. Ad Hoc Proposed Program Committee

8. Other Related Benefits Business

9. Adjournment

Contact: James W. Sarver, 18th And Brazos Streets, Austin, Texas 78701, (512) 867–3217.
Filed: August 26, 1997, 11:34 a.m.

TRD-9711279

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General Land Office

Tuesday, September 2, 1997, 10:00 a.m.

Stephen F. Austin Building, 1700 North Congress Avenue, Room 831

Austin

School Land Board

REVISED AGENDA:

Executive Session and Open Session- consideration of potential sale, trade or purchase of land in Travis County relating to the acquisition of the Pease Mansion.

Contact: Linda K. Fisher, 1700 North Congress Avenue, Austin, Texas 78701, Room 836, (512) 463–5016.
Filed: August 25, 1997, 11:36 a.m.

TRD-9711214

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Office of the Governor

Friday, September 12, 199, 9:00 a.m.

1112 North Street, Nacogdoches Recreation Center and Public Library

Nacogdoches

Texas Governor's Committee on People with Disabilities

AGENDA:

1. Call to Order/Introductions/Housekeeping/Recognition of Local Guests/Approval of Minutes

2. Public Comments/Invitied Presentations

3. Committee Members/Ex Officio Representatives' Reports

4. Executive Director's Report

5. Selecting Dates for FY 1998 Governor's Committee Meetings

6. Focus Groups on FY 1997 Committee Objectives

7. Discussion/Possible Action: Committee Member Objectives for FY 1998

8. Focus Groups on Fy 1998 Committee Member Objectives

9. Concurrent Subcommittee Meetings (see attached agendas)

10. Subcommittee Action Items and Reports

11. Adjournment

Contact: Pat Pound, 1100 San Jacinto, #142, Austin, Texas 78701, (512) 463–5743.
Filed: August 25, 1997, 11:38 a.m.

TRD-9711221

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Texas Health Care Information Council

Friday, September 5, 1997, 8:30 a.m.

Joe C. Thompson Conference Center, Room 2.122, 26th and Red River Streets

Austin

Consumer Education Committee

AGENDA:

The Texas Health Care Council's Consumer Education Committee will convene in open session, deliberate, and possibly take formal action on the following items: consumer education plans relating to implementation of adopted and proposed rules; design and implementation of program for consumer education, as required in Chapter 108, Texas Health and Safety Code; acquisition of consultant's services; Quality Methods and Consumer Education Technical Advisory Committee mission and future assignments; and , presentation by Dr. Hardy Loe concerning contract with UT School of Public Health to develop statewide health care information plan.

Contact: Jim Loyd, 4900 North Lamar Boulevard, OOL-3407, Austin, Texas 78751, (512) 424–6490, fax: (512) 424–6491.
Filed: August 26, 1997, 1:03 p.m.

TRD-9711283

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Friday, September 5, 1997, 8:30 a.m.

Joe C. Thompson Conference Center, Room 2.108, 26th and Red River Streets

Austin

Appointments Committee

AGENDA:

The Texas Health Care Information Council Appointments Committee will convene in open session, deliberate, and possibly take formal action on the following items: discussion and formal recommendation concerning by-laws for technical advisory committees, appointees to Health Information Systems TAC, and reconstitution of existing technical advisory committees.

Contact: Jim Loyd, 4900 North Lamar Boulevard, OOL-3407, Austin, Texas 78751, (512) 424–6490, fax: (512) 424–6491.
Filed: August 26, 1997, 1:03 p.m.

TRD-9711284

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Friday, September 5, 1997, 9:30 a.m.

Joe C. Thompson Conference Center, Room 2.108, 26th and Red River Streets

Austin

Non-Hospital Discharge Data and Extended Information Plan Committee

AGENDA:

The Texas Health Care Information Council's Non-Hospital Discharge Data and Extended Information Plan Committee will convene in open session, deliberate, and possibly take formal action on the following items: HMO Technical Advisory Committee's August 14 meeting, HEDIS data element recommendations, mission, and future activities; presentation by Dr. Hardy Loe concerning contract with UT School of Public Health to develop statewide health information plan; vote on recommendation to Council of required HEDIS data elements; and acquisition of consultants services relating to 25 TAC §1301.31–1301.35.

Contact: Jim Loyd, 4900 North Lamar Boulevard, OOL-3407, Austin, Texas 78751, (512) 424–6490, fax: (512) 424–6491.
Filed: August 26, 1997, 1:03 p.m.

TRD-9711285

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Friday, September 5, 1997, 9:30 a.m.

Joe C. Thompson Conference Center, Room 3.120, 26th and Red River Streets

Austin

Hospital Discharge Data Committee

AGENDA:

The Texas Health Care Information Council's Hospital Discharge Data Committee will convene in open session, deliberate, and possibly take formal action on the following items: discussion and formal recommendation on adoption of proposed amendments and rules relating to hospital discharge data rules published at 22 TexReg 7490 (August 12, 1997); information system design and data warehouse; and, Quality Methods and Consumer Education Technical Advisory Committee's mission, future assignments, and formal recommendation on selection of risk and severity adjustment methodology.

Contact: Jim Loyd, 4900 North Lamar Boulevard, OOL-3407, Austin, Texas 78751, (512) 424–6490, fax: (512) 424–6491.
Filed: August 26, 1997, 1:03 p.m.

TRD-9711282

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Friday, September 5, 1997, 10:30 a.m.

Joe C. Thompson Conference Center, Room 3.120, 26th and Red River Streets

Austin

Board Meeting

AGENDA:

The Texas Health Care Information Council will convene in open session, deliberate, and possibly take formal action on the following items: approval of minutes; committee reports, including formal recommendation of contract for training by NCQA; formal proposal of amendments and rules relating to hospital discharge data rules published at 22 TexReg 7490 (August 12, 1997) election of members of Executive committee; discussion and authorization for signature of THIN contract by Acting Executive Director; presentation by Dr. Hardy Loe concerning current contract with UT School of Public Health to develop statewide health care information plan; redesignation of committee memberships; technical advisory committee reports (activity report, approval of by-laws, membership designation for Health Information System review of composition and size of all TACs and recommendation of risk and severity adjustment methodology); formal adoption of rusk and severity adjustment methodology; staff report (Biennial Operating Plan for DIR, travel/ training report, application of Fair Labor Standards Act, and status of consultants and job postings); and, executive session (as authorized in §551.071 and 551.074, Government Code).

Contact: Jim Loyd, 4900 North Lamar Boulevard, OOL-3407, Austin, Texas 78751, (512) 424–6490, fax: (512) 424–6491.
Filed: August 26, 1997, 1:03 p.m.

TRD-9711281

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Friday, September 5, 1997, 10:30 a.m.

Joe C. Thompson Conference Center, Room 3.120, 26th and Red River Streets

Austin

Board Meeting

REVISED AGENDA:

The Texas Health Care Information Council will convene in open session, deliberate, and possibly take formal action on the following items: approval of minutes; committee reports, including formal recommendation of contract for training by KNACK; formal proposal of amendments and rules relating to hospital discharge data rules published at 22 Taxer 7490 (August 12, 1997) election of members of Executive committee; discussion and authorization for signature of THIN contract by Acting Executive Director; presentation by Dr. Hardy Loe concerning current contract with UT School of Public Health to develop statewide health care information plan; redesignation of committee memberships; technical advisory committee reports (activity report, approval of by-laws, membership designation for Health Information System review of composition and size of all TACs and recommendation of risk and severity adjustment methodology); formal adoption of rusk and severity adjustment methodology; staff report (Biennial Operating Plan for DIR, travel/ training report, application of Fair Labor Standards Act, and status of consultants and job postings); discussion and authorization for signature by Acting Executive Director of contract with Margaret Solnick; and, executive session (as authorized in §§551.071 and 551.074, Government Code).

Contact: Jim Loyd, 4900 North Lamar Boulevard, OOL-3407, Austin, Texas 78751, (512) 424–6490, fax: (512) 424–6491.
Filed: August 26, 1997, 2:49 p.m.

TRD-9711291

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Texas Department of Health

Monday, September 8, 1997, 9:30 a.m.

Tower Building, Room T-607, Texas Department of Health, 1100 West 49th Street

Austin

Midwifery Board

REVISED AGENDA:

The Board will introduce guests, and discuss and possibly act on: board interrelationships (how the Board of Health interrelates with the Midwifery Board; how the associateship of Health Care Delivery interrelates with Midwifery Board and the Midwifery Program; and how the Midwifery Program interrelates with the Midwifery Board and midwives); birthing centers; the Bureau of Vital Statistics/birth certificates; an overview of the Open Meetings Act, "Open Record Act, and the functions of the Office of General Counsel; approval of the minutes of the June 9, 1997, meeting; Grievance committee Report (resolution for complaints 97–03 and 97–04; and appeal of the resolution for complaint 97–02); committee assignment review and appointments (Education Committee; Grievance Committee; Oxygen Rules committee; Education Rules Committee; Grievance rules Committee; and Standards Rules committee); proposed rules concerning the use of oxygen (25 Texas Administrative Code, Chapter 38), North American Registry of Midwives (NARM) certification; announcements and comments.

To request ADA accommodation, please contact Suzzanna C. Currier, ADA Coordinator in the Office of Civil Rights at (512) 458–7627 or TDD at (512) 458–7708 at least four days prior to the meeting.

Contact: Belva Alexander, 1100 West 49th Street, Austin, Texas 78756, (512) 458–7111, Extension 2067.
Filed: August 29, 1997, 9:49 a.m.

TRD-9711450

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Health and Human Services Commission

Thursday, September 11, 1997, 9:15 a.m.

Texas Department of Human Services, 701 West 51st Street, Public Hearing Room

Austin

Medical Care Advisory Committee

AGENDA:

Opening Comments; State Medicaid Director's Comments; Approval of Minutes; Federal Legislative Update: Medicaid Managed Care Report; Authorized Ambulance Service; Fiscal Accountability Rules for ICF/MR and IICS; Proposed Repeal of Diagnostic Services for

Persons with Potential for Mental Retardation; Void Marriages, Annulments, and Divorce; Garnishment of Income; Gap Month (Three Months Prior Medicaid for SSI Clients); Sunset Report; Open Discussion by Members; Next Meeting/Adjournment.

To request ADA accommodation, please contact Suzzanna C. Currier, ADA Coordinator in the Office of Civil Rights at (512) 458–7627 or TDD at (512) 458–7708 at least four days prior to the meeting.

Contact: Sharon Dobbs, 4900 North Lamar Boulevard, Austin, Texas 78756, (512) 424–6569.
Filed: August 27, 1997, 10:15 a.m.

TRD-9711349

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Texas Higher Education Coordinating Board

Tuesday, September 9, 1997, 9:00 a.m.

Chevy Chase Office Complex, Building One, Room 1.100A, 7700 Chevy Chase Drive

Austin

Health Professions Education Advisory Committee

AGENDA:

Consideration of matters relating to the Health Professions Education Advisory Committee.

Contact: Dr. Alfred Maldonado, P.O. Box 12788, Capitol Station, Austin, Texas 78711, (512) 483–6213, (512) 483–6540.
Filed: August 27, 1997, 9:19 a.m.

TRD-9711331

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Texas Department of Housing and Community Affairs

Friday, August 29, 1997, 8:45 a.m.

507 Sabine Street, Room 437

Austin

Board

EMERGENCY MEETING AGENDA:

The Board of Texas Department of Housing and Community Affairs will meet to consider and possibly act on: Issuance of Multi-Family bonds for Windrest Apartments; Executive Session for Personnel Matters; Anticipated Litigation (Potential or Threatened), Personnel Matters regarding duties and responsibilities in relationship to Budget under §551.074 Texas Government Code; Consultation with Attorney; Action in Open Session on items discussed in Executive Session. Adjourn.

REASON FOR EMERGENCY: This meeting is necessary to discuss affordable housing bond issues that have to be discussed (law requirements) before September 1, 1997.

Contact: Larry Paul Manley, 507 Sabine Street, Austin, Texas 78701, (512) 475–3934.
Filed: August 25, 1997, 11:05 a.m.

TRD-9711158

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Texas Department of Human Services

Friday, September 5, 1997, 10:00 a.m.

John H. Winters Building, 701 West 51st Street, 360 West Conference Room

Austin

Aged and Disabled Advisory Committee

AGENDA:

1. Opening Comments. 2. Deputy Commissioner's Comments. 3. Approval of the Minutes. ACTION ITEMS: 4. Chapter 90 Licensing Standards for Intermediate Care Facilities for Persons with Mental Retardation or Related Conditions (ICFMR/RC). INFORMATION/ TECHNICAL RULES: 5. Gap Month (Three Months Prior Medicaid for SSI Clients). 6. Void Marriages, Annulments and Divorce. 7. Garnishment of Income. 8. Technical Rule Changes: Community Care for Aged and Disabled. REPORTS: Consideration of funds received through the In-Home and Family Support Program (IHFSP). Proceedings of the Subcommittee on Services to Persons with Disabilities. Proceedings of the Nursing Facility Subcommittee. 9. Open Discussion by Members. 10. Next Meeting/Adjournment.

Contact: Anthony Venza, P.O. Box 149030, Austin, Texas 78714–9030, (512) 438–4943.
Filed: August 28, 1997, 11:56 a.m.

TRD-9711384

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Commission on Jail Standards

Thursday, September 4, 1997, 9:00 a.m.

John R. Reagan Building, 105 West 15th Street, Room 104

Austin

AGENDA:

Call to order. Roll call of Commission members. Reading and approval of minutes of August 6–7, 1997 meeting. New Business: Issues Affecting Out-of-State Inmates. Other Business. Executive Session. Adjourn.

Contact: Jack E. Crump, P.O. Box 12985, Austin, Texas 78711, (512) 463–5505.
Filed: August 28, 1997, 1:00 p.m.

TRD-9711387

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Texas Department of Licensing and Regulation

Wednesday, September 10, 1997, 9:00 a.m.

920 Colorado, E.O. Thompson Building, Fourth Floor Conference Room 420

Austin

Enforcement Division, Boilers

AGENDA:

According to the complete agenda, the Department will hold Administrative Hearings to consider the possible assessment of administrative penalties and inspection fees against the following Respondents: Boston Marker-Houston; Carters One Hour Cleaners; Catholic Mutual Group; Center for Diagnostic Medical Service; and Charlane Apartments for failing to pay boiler inspection/certification fees to obtain certificates of operation for Respondents' boiler(s), a violation of the Texas Health and Safety Code Annotated (the Code) Chapter 755 and 16 Texas Administrative Code (TAC), Chapter 65, pursuant to the Code and Texas Revised Civil Statutes Annotated article 9100; Texas Government Code Chapter 2001 (APA); 16 TAC Chapter 65.

Contact: Paula Hamje, 920 Colorado, Austin, Texas 78701, (512) 463–3192.
Filed: August 28, 1997, 4:55 p.m.

TRD-9711415

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Wednesday, September 10, 1997, 1:00 p.m.

920 Colorado, E.O. Thompson Building, Fourth Floor Conference Room 420

Austin

Enforcement Division, Boilers

AGENDA:

According to the complete agenda, the Department will hold Administrative Hearings to consider the possible assessment of administrative penalties and inspection fees against the following Respondents: Chesapeake Apartments; Chris's Texas Maid; City Cleaning Company; Classic Cleaners; Mark Coheley; Comet Cleaners (Mansfield); Comet Cleaners (Abilene) and Comet Cleaners (Irving) for failing to pay boiler inspection fees to obtain certificates of operation for Respondents' boiler(s), a violation of the Texas Health and Safety Code Annotated (the Code) Chapter 755 and 16 Texas Administrative Code (TAC), Chapter 65, pursuant to the Code and Texas Revised Civil Statutes Annotated article 9100; Texas Government Code Chapter 2001 (APA); 16 TAC Chapter 65.

Contact: Paula Hamje, 920 Colorado, Austin, Texas 78701, (512) 463–3192.
Filed: August 28, 1997, 4:55 p.m.

TRD-9711416

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Texas Lottery Commission

Tuesday, September 2, 1997, 9:00 a.m.

611 East Sixth Street, Grant Building, Commission Auditorium

Austin

AGENDA:

Call meeting to order; approval of the minutes of the June 30, 1997 and July 11, 1997 Commission meetings; consideration of and possible action on continuing commission meeting Minutes; report by the Bingo Advisory Committee chair and possible discussion and/or action on the Bingo Advisory Committee activities; consideration of and possible action, including adoption of amendments, on 16 TAC §492.567, concerning the Bingo Advisory Committee; Consideration of and possible action on an appeal of the Executive Director's determination of a protest filed by GTECH, if any; consideration of and possible action, including adoption, on new rule 16 TAC §401.369, concerning retailer sales incentive; status report, possible discussion and possible action on the procurement of audit services to audit the lottery operator; consideration of and possible action on the Texas Lottery's FY 1998 advertising program; consideration of and possible action on proposed Lottery instant ticket concepts; status report, possible discussion, and possible action, including implementation, on legislation; consideration and possible action on whether to pay increased dues to NASPL and whether to vote to have NASPL hire a public relations firm; consideration and possible action on the purchase of directors and officers' liability insurance; consideration of the status and possible entry of an order in any contested case if a proposal for decision has been received from the assigned administrative law judge and the time period has lapsed for the filing of exceptions and replies; consideration and possible action on a Motion for Rehearing in Docket Number 362–97–0074.B, Cameron Iron Workers Social and Charity Club: Commission may meet in Executive Session; return to open session for further deliberation and possible action on any matter discussed in Executive Session; report by Executive Director and possible discussion and/or action on the agency's planning calendar; operation of the agency; financial status of the agency; HUB performance; and the agency's budget and budget goals for the next biennium and FTE status; and adjournment.

For ADA Assistance, call Michelle Bernal-Guerrero at (512) 344–5113 at least two days prior to meeting.

Contact: Michelle Bernal-Guerrero, P.O. Box 16630, Austin, Texas 78761–6630, (512) 344–5113.
Filed: August 26, 1997, 8:01 a.m.

TRD-9711260

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Saturday, September 6, 1997, 9:00 a.m.

611 East Sixth Street, Grant Building, Commission Auditorium

Austin

AGENDA:

Call meeting to order; Consideration and possible action, including adoption of amendments, on 16 TAC §402.567, concerning the Bingo Advisory Committee; consideration and possible action, including adoption, on new rule 16 TAC §402.568, concerning distribution of proceeds for charitable purposes; consideration and possible action on the withdrawal of emergency rule 16 TAC §402.568; consideration and possible action on the withdrawal of emergency rule 16 TAC 402.568; consideration and possible action on the appointment, employment, and duties of the Bingo Operations Director; consideration and possible action on an appeal of the Executive Director's Determination of a protest filed by GTECH; consideration and possible action on the state audit report relating to the Texas Lottery Commission; Commission may meet in Executive session; return to open session for further deliberation and possible action on any matter discussed in Executive Session, and adjournment.

For ADA Assistance, call Michelle Bernal-Guerrero at (512) 344–5113 at least two days prior to meeting.

Contact: Michelle Bernal-Guerrero, P.O. Box 16630, Austin, Texas 78761–6630, (512) 344–5113.

Filed: August 29, 1997, 8:52 a.m.

TRD-9711435

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Texas Natural Resource Conservation Commission

Tuesday, September 2, 1997, 9:00 a.m.

Room 201S, Building E, 12100 Park 35 Circle

Austin

AGENDA:

The Commission will consider approving the following matters on the agenda: Resolution.

Contact: Doug Kitts, 12100 Park 35 Circle, Austin, Texas 78753, (512) 239–3317. .
Filed: August 25, 1997, 1:49 p.m.

TRD-9711229

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Thursday, September 4, 1997, 9:00 a.m.

Texas A&M University, Corpus Christi

Natural Resources Center, Conference Room 1003, 6300 Ocean Drive

Corpus Christi

Scientific/Technical Advisory Committee of the Corpus Christi Bay National Estuary Program

AGENDA:

I. Call to Order/Introductions/Minutes

II. Program Update

III. Coastal Bend Bays Plan STAC Review

IV. Addition Items/Adjourn

Contact: Richard Volk, TAMU-CC, 6300 Ocean Drive, Corpus Christi, Texas 78412, (512) 980–3240.
Filed: August 26, 1997, 1:10 p.m.

TRD-9711287

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Monday, September 8, 1997, 4:00 p.m.

City of Corpus Christi City Hall, Basement Conference Room

Corpus Christi

AGENDA:

I. Call to Order/Introductions/Approval of Minutes

II. Program Update

III. Coastal Bend Bays Plan CAC Review

IV. Addition Items/Adjourn

Contact: Richard Volk, TAMU-CC, 6300 Ocean Drive, Corpus Christi, Texas 78412, (512) 980–3240.
Filed: August 26, 1997, 1:10 p.m.

TRD-9711286

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Thursday, September 11, 1997, 10:00 a.m.

Stephen F. Austin Building, 1700 North Congress Avenue, 11th Floor, Suite 1100

Austin

AGENDA:

For a hearing before an administrative law judge of the State Office of Administrative Hearings on an application filed with the Texas Natural Resource Conservation Commission by the CITY OF RED OAK to amend sewer Certificate of Convenience and Necessity Number 20436 which authorizes the provision of sewer utility service in Ellis County, Texas. The applicant also proposed decertification of a portion of CCN Number 20427 issued to the City of Glenn Heights. The proposed utility service area is located approximately two miles northwest of downtown Red Oak, Texas and is generally bounded on the north by the Red Oak city limits, on the east by I35 East, on the south by Ovilla Road (FM 664), and on the west by the Red Oak city limits. The total area being requested includes approximately 262 acres and 59 current customers located entirely within the city limits of Red Oak. SOAH Docket Number 582–97–1562.

Contact: Pablo Carrasquillo, P.O. Box 13025, Austin, Texas 78711–3025, (512) 475–3445.
Filed: August 28, 1997, 8:19 a.m.

TRD-9711371

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Tuesday, September 23, 1997, 2:00 p.m.

Holiday Inn College Station-The Valley Room

1503 South Texas Avenue

College Station

AGENDA:

TNRCC will conduct an informal public meeting regarding the application of ENVIROCLEAN MANAGEMENT SERVICES, INC., Proposed Registration Number MSW40115, to construct and operate a Type V municipal solid waste transfer station. The proposed site contains about 1.44 acres of land and, if approved, will receive approximately 24 tons of municipal solid waste per day. The proposed facility will be located at 7300 FM 2818 North, Building A, within the confines of Northpoint Business Park, southwest of the intersection of Highway 6 and FM 2818 in Bryan, Brazos County, Texas.

Contact: Charles Stavley or Ann Scudday, P.O. Box 13087, Mail Code 176, Austin, Texas 78701, (512) 239–6688 or (512) 239–4756.
Filed: August 25, 1997, 10:45 a.m.

TRD-9711211

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Board of Nurse Examiners

Thursday, Friday, September 18–19, 1997, 8:30 a.m.

Knipling Center, Methodist Hospital, 3615 19th Street

Lubbock

AGENDA:

The Board of Nurse Examiners will discuss and possibly act on: approval of the minutes from the July meeting, June and July financial statements; consider education matters, including a public hearing at 9:30 a.m. on September 18, 1997 to consider a request from San Antonio Community College, ADN Program for an extended campus at Kerrville. The Board will discuss and possibly act on a student eligibility rule, proposed rule change to Chapter 213, Practice and Procedure, and receive reports from various committees/ The Board will take action on Petitions for Declaratory Orders for Dana M. Cobb-Gregory, Betty S. Storms; Suzanne M. Bailin, Teresa L. Burden, Telisa R. Neff; and Elizabeth K. Richter; applicants for Initial Licensure for Bernadine Hoffman and Ronald E. Rushfeldt. The Board will consider Agreed Orders for Venetia Ann Beard, #551007, Carolyn B. Bernardo, #551015, Gloria D. Campbell, #571281, Ginger I. Dare, #547179, Jo Carrol Hall, #562787, Noel Roscoe Jackson, #439309, Dianna L. Mann, #508188, Ramona R. Maples, #518400, Lea E. Peterson, $526472, Mary L. Puckett, #503804, John E. Roberts, #596611. The Board will take action on proposed ALJ Decisions for Lori Ann Bickett, #593630, Gregory Allen Darden, #594245, Belinda J. Dotson, #562374, Anita L. Hilton, #567883, Martha Kelton-Foss, #583127, Cornelia M. Murphy, #585437, Ronald E. Park, #523516, Shawn Robertson, #568447, Deborah A. Stauckey, #255628, Julie Ann Sutton, #574679, Michael Guy Taber, #590037. An Open Forum will be held from 1:30–2:00 p.m. on September 18, 1997 to allow interested parties an opportunity to address the board. On September 19, 1997, the Board will continue with the new member board orientation.

Contact: Erlene Fisher, Box 430, Austin, Texas 78767, (512) 305–6811.
Filed: August 28, 1997, 1:42 p.m.

TRD-9711388

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Board of Vocational Nurse Examiners

Monday, Tuesday, September 15–16, 1997, 9:00 a.m.

Hobby Building, Tower 2, Room 225, 333 Guadalupe Street

Austin

AGENDA:

Call to Order; Introduction of Board Members; Introduction of New Staff; Approval of Minutes; Education Report (Program Matters, Program Actions, Meetings/Seminars Attended); Unfinished Business (Budget Information, TPAPN, Executive Director Evaluation and Board Evaluation); Executive Director Report; New Business (Delegate Assembly, Election of Vice President and Secretary-Treasurer, Rule Changes — Rule 239.11); Attorney General Representative Briefing; Executive Session; Rules Committee Meeting.

Tuesday, September 16, 1997– 9:00 a.m. — Administrative Hearings; Agreed Orders; Rules Committee Recommendations; any Unfinished Business and Adjournment.

On Call: Executive Session to discuss personnel issues.

Contact: Marjorie A. Bronk, 333 Guadalupe Street, Suite 3–400, Austin, Texas 78701, (512) 305–8100.
Filed: August 26, 1997, 8:19 a.m.

TRD-9711262

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Texas Pension Review Board

Thursday, September 11, 1997, 1:30 p.m.

State Capitol Extension, Committee Room E1.016

Austin

AGENDA:

1. Meeting Called to Order

2. Roll Call

3. Reading and Adoption of Minutes of Previous Meeting

4. Discussion and Authorization to Change Time of PRB Conference

5. Discussion and Possible Action on Adopting An Ethics Policy for PRB Board Members and PRB Staff

6. Committee Reports with Discussion and Possible Action

A. Actuarial-Chair Leonard Cargill

1. Compliance Update —(Ginger Smith)

B. Administration- Chair Shad Rowe

1. Salary of Executive Director

C. Legislative — Chair Shari Shivers

D. Research — Chair Don Reynolds

1. Database Update (Kevin Deiters)

7. Set Date and Location for Next Board Meeting

8. Old Business

9. Announcements and Invitation for Audience Participation

10. Executive Director's Report

11. Chairman's Report

12. Adjournment

Contact: Lynda Baker, P.O. Box 13498, Austin, Texas 78711, (512) 463–1736.
Filed: August 28, 1997, 3:00 p.m.

TRD-9711395

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Texas Polygraph Examiners Board

Thursday, Friday, September 11–12, 1997, 7:00 p.m. and 8:30 a.m. respectively

DPS Building C, 5805 North Lamar, Academy Administrative Commission Room

Austin

Full Board

AGENDA:

The Board will adjourn during the meeting to administer the Phase 3 portion of the polygraph examiners examination to eligible interns. The full Board meeting will resume at the conclusion of the testing period. If necessary, the Board will meet Saturday, September 13, 1997, 8:30 a.m., to conclude board business.

The Board will review administrative items as listed in the full agenda on file with the Texas Register. The Board will review the form(s) requesting information from polygraph examiners; discuss a Five Year Plan; review current rules and the Polygraph Examiners Act for consideration of future changes. The Board will discuss the filing of an attorney general opinion request and its status concerning §19A of the Polygraph Examiners Act as it relates to the Texas Family Code, reporting child abuse, Chapter 261.

Contact: Frank DiTucci, P.O. Box 4087, Austin, Texas 78773–0001, (512) 424–2058.
Filed: August 28, 1997, 8:47 a.m.

TRD-9711375

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Texas Board of Private Investigators and Private Security Agencies

Tuesday, September 9, 1997, 8:30 a.m.

John H. Reagan Building, 105 West 15th Avenue

Austin

AGENDA:

I. Approval of Minutes of July 16, 1997 Board Meeting.

II. Executive Session to Consider, Review, Discuss, and Evaluate the Applications Received and the Applicants for the Executive Director Position Pursuant to §551.074, Texas Government Code.

III. Return to Open Session for Further Consideration, Review, Discussion, Evaluation or Action on the Applications Received and the Applicants for the Executive Director Position Pursuant to §551.074, Texas Government Code.

IV. Discussion, Review and Possible Board Action or Approval of Expenditure of Funds Regarding the Contract of Porterfield and Associates.

V. Discussion and Possible Board Action, Regarding any Proposals for Decision which were tabled at the July 16, 1997 Board Meeting.

New Business:

I. Review of Staff Recommendation and Board Action on New Licenses, Suspension Orders, Reinstatement Orders, Revocations, Denials, Reprimands, Summary Suspensions, Summary Denials, Requests for Waivers, Other Proposals for Decision, Requests for Rehearings, Reconsiderations and Related Issues.

Contact: Clema D. Sanders, P.O. Box 13509, Austin, Texas 78711, (512) 463–5545.
Filed: August 29, 1997, 9:06 a.m.

TRD-9711436

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Texas State Board of Public Accountancy

Wednesday, September 10, 1997, 10:00 a.m.

333 Guadalupe Street, Tower III, Suite 900, Room 910

Austin

Major Case Enforcement Committee

AGENDA:

Discussion to consider file numbers:

94–09–24L

94–09–25L

94–09–26L

94–09–27L

Contact: Paul Gavia, 333 Guadalupe Street, Tower III, Room 900, Austin, Texas 78701–3900, (512) 505–5545.
Filed: August 28, 1997, 4:26 p.m.

TRD-9711405

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Wednesday, September 10, 1997, 1:00 p.m.

333 Guadalupe Street, Tower III, Suite 900, Room 950F

Austin

Rules Committee

AGENDA:

A. Consideration of proposed amendment to Board Rule 501.40 regarding Registration Requirements.

B. Consideration of proposed amendment to Board Rule 501.43 regarding Advertising.

C. Comparison of AICPA's and Board's rules in Independence.

D. Discussion of publication of Board Rules in the *Board Report.*

Contact: Paul Gavia, 333 Guadalupe Street, Tower III, Room 900, Austin, Texas 78701–3900, (512) 505–5545.
Filed: August 28, 1997, 4:26 p.m.

TRD-9711404

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Wednesday, September 10, 1997, 1:00 p.m.

333 Guadalupe Street, Tower III, Suite 900, Room 910

Austin

Qualifications Committee

AGENDA:

A. Review of information relating to the November 1997 CPA exam.

1. Review of non-routine exam applications.

a. Correspondence from Modesty Lien.

b. Application from applicant 02–25–58.

2. Consideration of proposed board and staff assignments.

B. Review of issuance applications for the CPA certificate.

1. Applicant — 11–11–55.

2. Applicant — 11–06–70.

3. Applicant — 02–10–71.

C. Review of part-time student provision of the Act.

1. Statistical Information

2. Frances Moore.

D. Review of Unusual Incident Report from NASBA.

E. Review and discussion of ad hoc exam committee report.

F. Consideration of amendments to *Rule 511.57.*

Contact: Paul Gavia, 333 Guadalupe Street, Tower III, Room 900, Austin, Texas 78701–3900, (512) 505–5545.
Filed: August 28, 1997, 4:28 p.m.

TRD-9711406

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Wednesday, September 10, 1997, 2:00 p.m.

333 Guadalupe Street, Tower III, Suite 900, Room 910

Austin

Quality Review Committee

AGENDA:

A. Consideration of proposed changes to *Board Rule 527.6 (Reporting to the Board)*

B. Consideration of Quality review statistics.

C. Review of the quality review flow chart.

D. Reporting from QROB regarding referrals.

E. Consideration of a request from a firm.

Contact: Paul Gavia, 333 Guadalupe Street, Tower III, Room 900, Austin, Texas 78701–3900, (512) 505–5545.
Filed: August 28, 1997, 4:28 p.m.

TRD-9711407

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Wednesday, September 10, 1997, 3:00 p.m.

333 Guadalupe Street, Tower III, Suite 900, Room 950F

Austin

Regulatory Compliance Committee

AGENDA:

A. Approval of the Board's financial statements.

B. Review of FY 1998 operating budget.

C. Review of letter received from the Texas Commission on Human Rights concerning the Board's Affirmative Action Plan.

D. Consideration of the Board's practice unit license fee.

Contact: Paul Gavia, 333 Guadalupe Street, Tower III, Room 900, Austin, Texas 78701–3900, (512) 505–5545.
Filed: August 28, 1997, 4:28 p.m.

TRD-9711408

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Wednesday, September 10, 1997, 3:30 p.m.

333 Guadalupe Street, Tower III, Suite 900, Room 910

Austin

Licensing Committee

AGENDA:

A. Report on the June 7, 1997 swearing-in ceremonies. Review of plans for the November 15, 1997 swearing-in ceremonies

B. Consideration of the previous reinstatement of a licensee who had reported a conviction.

C. Review of licensing statistics.

D. Review of statistical data regarding the registration of partnerships and professional corporations since the last meeting.

E. Review of statistical data of individuals registered under Sections 12, 13 and 14 of the *Act* since the last meeting.

Contact: Paul Gavia, 333 Guadalupe Street, Tower III, Room 900, Austin, Texas 78701–3900, (512) 505–5545.
Filed: August 28, 1997, 4:29 p.m.

TRD-9711409

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Wednesday, September 10, 1997, 4:00 p.m.

333 Guadalupe Street, Tower III, Suite 900, Room 910

Austin

Executive Committee

AGENDA:

A. Review of legal and personnel matters:

1. Report to the Executive Committee on the performance evaluation of the Executive Director by the Regulatory Compliance Committee (EXECUTIVE SESSION).

2. Consultation to seek the advice of the Board's Attorney concerning pending or contemplated litigation (EXECUTIVE SESSION).

3. Report on resignation of the Board's General Counsel.

B. Review of plans for NASBA annual meeting.

C. Review of correspondence.

Contact: Paul Gavia, 333 Guadalupe Street, Tower III, Room 900, Austin, Texas 78701–3900, (512) 505–5545.
Filed: August 28, 1997, 4:29 p.m.

TRD-9711410

♦ ♦ ♦

Thursday, September 11, 1997, 9:00 a.m.

333 Guadalupe Street, Tower III, Suite 900, Room 910

Austin

Board

AGENDA:

Consideration of: Consultation to seek the advice of the Board's attorney concerning pending or contemplated ligation (EXECUTIVE SESSION); Evaluation of Executive Director (EXECUTIVE SESSION); Committee Reports from Executive, Quality Review, Regulatory Compliance, Licensing, Technical Standards, Behavioral Enforcement, Qualifications, Rules and Major Case Committees; Adoption of Board Rules, Agreed Consent Orders, Board Orders and Proposals for Decision.

Contact: Paul Gavia, 333 Guadalupe Street, Tower III, Room 900, Austin, Texas 78701–3900, (512) 505–5545.
Filed: August 28, 1997, 4:29 p.m.

TRD-9711411

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State Office of Risk Management

Tuesday, September 2, 1997, 10:00 a.m., rescheduled from September 3, 1997, 10:00 a.m.

300 West 15th Street

Austin

Risk Management Board

REVISED AGENDA:

1. Call to Order;

2. Discussion and review of House Bill 2133

3. Executive Session: Pursuant to §551.-074, Government Code, to consider personnel related matters involving public officers or employees, and pursuant to §551.071, Government Code, to discuss matters relating to and to receive advice from counsel concerning privileged attorney-client communications, settlement offers, and/or contemplated and pending litigation including, but not limited to the selection of an Executive Director, Acting Executive Director or other person with the legal authority to obligate SORM and to exercise all rights, powers, and duties imposed or conferred by law on SORM other than those specifically reserved to the board members;

4. Discussion, consideration and possible action on resolution to reimburse OAG and/or TWCC for any monies expended on behalf of SORM;

5. Discussion, consideration and possible action or delegation of authority to act on issues related to the transition of the Office of the Attorney General's Worker's Compensation Division (WCD) and the Texas Workers' Compensation Commission's Division of Risk Management (SRM).

6. Confirmation of future public meeting dates;

7. Adjournment.

Contact: Albert Betts, Jr., P.O. Box 13777, Austin, Texas 78711, (512) 475–1440.
Filed: August 26, 1997, 3:39 p.m.

TRD-9711298

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Wednesday, September 3, 1997, 10:00 a.m.

300 West 15th Street

Austin

Risk Management Board

AGENDA:

1. Call to Order;

2. Discussion and review of House Bill 2133

3. Executive Session: Pursuant to §551.-074, Government Code, to consider personnel related matters involving public officers or employees, and pursuant to §551.071, Government Code, to discuss matters relating to and to receive advice from counsel concerning privileged attorney-client communications, settlement offers, and/or contemplated and pending litigation including, but not limited to the selection of an Executive Director, Acting Executive Director or other person with the legal authority to obligate SORM and to exercise all rights, powers, and duties imposed or conferred by law on SORM other than those specifically reserved to the board members;

4. Discussion, consideration and possible action on resolution to reimburse OAG and/or TWCC for any monies expended on behalf of SORM;

5. Discussion, consideration and possible action or delegation of authority to act on issues related to the transition of the Office of the Attorney General's Worker's Compensation Division (WCD) and the Texas Workers' Compensation Commission's Division of Risk Management (SRM).

6. Confirmation of future public meeting dates;

7. Adjournment.

Contact: Albert Betts, Jr., P.O. Box 13777, Austin, Texas 78711, (512) 475–1440.
Filed: August 26, 1997, 10:14 p.m.

TRD-9711263

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Texas Senate

Tuesday, September 16, 1997, 9:00 a.m.

900 Bagby, Houston City Council Chamber

Houston

The Joint Select Committee on Historically Underutilized Business

AGENDA:

I. Call to Order

II. Opening remarks by Senator Rodney Ellis

III. Invited Testimony

IV. Public Testimony

V. Adjournment

Contact: Helen Gonzalez, P.O. Box 12068, Capitol Station, Texas 78711, (512) 463–9071.
Filed: August 26, 1997, 11:22 a.m.

TRD-9711277

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Texas State Soil and Water Conservation Board

Wednesday, September 10, 1997, 8:00 a.m.

311 North Fifth Street, Hearing Room

Temple

AGENDA:

Minutes from July 16, 1997 board meeting; District Director Appointments; 1997 Annual Statewide Meeting of Soil and Water Conservation District Directors; Legislative Interim Studies; NRCS Field Of-

fice Structure; Public Information/Education Report; Twelve Month Expenditure Report ending August 31, 1997; Report on Supplemental Matching Fund Payments; Report on Annual Meeting Fund Balance; Board Member Travel; Report on State Comptroller's Post-Payment Audit; §319 Status Report; Senate Bill 503 Status Report; TMDL Activities; TNRCC Poultry Litter Study; Drought Response and Monitoring Committee; Cross Timber Concerned Citizens Law Suit; Financial Assistance Grants Limits on §319; Senate Bill 503 Cost Share Practices; Upper Colorado River Authority Proposed Brush Control Project; Corpus Christi Bay National Estuary Program; Galveston Bay Conference; Reports from Agencies and Guests; Human Resources Update; Coastal Coordination Council; Next Regular State Board Meeting, November 19, 1997.

Contact: Robert G. Buckley, P.O. Box 658, Temple, Texas, 76503, (254) 773–2250, TEX-AN 820–1250.
Filed: August 27, 1997, 1:52 p.m.

TRD-9711356

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Teacher Retirement System of Texas

Tuesday, September 9, 1997, Noon

1000 Red River, Room 420E

Austin

Medical Board

AGENDA:

Discussion of 1) the files of members who are currently applying for disability retirement and 2) the files of disability retirees who are due a re-examination report.

For ADA assistance, Call John R. Mercer, (512) 397–6400 or TDD (512) 84104497 at least two days prior to the meeting.

Contact: Don Cadenhead, 1000 Red River, Austin, Texas 78701–2698, (512) 397–6400.
Filed: August 27, 1997, 3:56 p.m.

TRD-9711370

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Texas State Technical College System

Thursday, September 4, 1997, 9:00 a.m.

1219 East Broadway

Sweetwater

Board of Regents Search Committee- Telephone Conference

AGENDA:

Discussion and Review of the following TSTC Board of Regents Search Committee Agenda: Recommendations, if any, to the full Board of Regents regarding Search Committee Meeting.

Contact: Sandra J. Krumnow, 3801 Campus Drive, Waco, Texas 76705, (254) 867–3964.
Filed: August 28, 1997, 4:33 p.m.

TRD-9711413

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Thursday, September 4, 1997, 9:05 a.m.

1219 East Broadway

Sweetwater

Board of Regents Search Committee-Closed Meeting Telephone Conference

AGENDA:

Closed meeting for the specific purposed provided in §§551.074 and 551.075. §551.074: Discuss Chancellor search process and review applications for the position.

Contact: Sandra J. Krumnow, 3801 Campus Drive, Waco, Texas 76705, (254) 867–3964.
Filed: August 28, 1997, 4:33 p.m.

TRD-9711414

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Texas Department of Transportation

Thursday, August 28, 1997, 9:00 a.m.

125 East 11th Street, First Floor, DeWitt C. Greer Building

Austin

Texas Transportation Commission

EMERGENCY REVISED AGENDA:

Supplement to the agenda has been added to the following item:

9. Routine Minute Orders

(f) Eminent Domain Proceedings:

(2) Johnson County- Authorize eminent domain proceedings to acquire approximately 5,256 square feet of land for state highway purposes, out of the M.W. Sanders Survey, Abstract Number 720, currently subject to litigation in Doris Gray and Mark Watts vs Texas Department of Transportation and the County of Johnson, Cause Number 249–80–95, in the 18th Judicial District Court of Johnson County, Texas.

REASON FOR EMERGENCY: In order to defend the state's title and avoid loss of the state property and a portion of a state highway facility to the detriment of the safety and welfare of the traveling public and the state.

Contact: Diane Northam, 125 East 11th Street, Austin, Texas 78701, (512) 463–8630.
Filed: August 26, 1997, 10:45 a.m.

TRD-9711265

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University Interscholastic League

Tuesday, September 2, 1997, 9:00 a.m.

Omni Southpark Hotel, IH35 South at Ben White

Austin

State Executive Committee

AGENDA:

AA. Coldspring Oakhurst Appeal of Eligibility Decision of District 21 AAA Executive Committee.

BB. Case Referred by District 27 AAAAA Executive Committee Recommending Penalty for School district Personnel Mr. Gene G lores, Baseball Coach, Del Rio High School, for Allowing Academically Ineligible Students to Participate in Violation of State Law.

CC. Failure to Participate in One-Act Play: Dallas Sameul, Itasca, Southland, Houston Forrest Brook.

DD. Bloomington IDS Appeal of District 27 AA Executive Committee Decision to Rule Seven Student Athletes Ineligible for Changing Schools for Athletic Purposes.

EE. Case Referred by District 7 AAA Executive Committee Concerning Student Athlete's Eligibility at Aledo Independent School District.

FF. Case Referred by District 9 AAA Executive Committee Recommending Penalty for School District Personnel Mr. Keith Hendrix, Coach, Decatur High School for Recruiting.

Contact: C. Ray Daniel, 3001 Lake Austin Boulevard, Austin, Texas 78711, (512) 471–5883.
Filed: August 27, 1997, 3:48 p.m.

TRD-9711369

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The University of Texas At Austin

Thursday, August 28, 1997, 3:30 p.m.

21st and San Jacinto, Bellmont Hall, Room 326

Austin

Council for Intercollegiate Athletics for Women

AGENDA:

I. Call to Order

II. Approval of Minutes of Previous Meeting.

III. New Business

IV. Announcements/Information Report

V. Executive Session — Personnel Matters Relating to Appointment, Employment, Evaluation, Assignment, Duties, Discipline, or Dismissal of Officers or Employees- §551.074 of the Texas Government Code.

VI. Adjournment

Contact: Jody Conradt, Bellmont Hall 718, Austin, Texas 78712–1286.(512) 449–4402.
Filed: August 25, 1997, 1:21 p.m.

TRD-9711228

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The University of Texas System

Wednesday-Saturday, September 3–6, 1997, Wednesday, 2:00 p.m., Thursday, 8:00 a.m., Friday, 8:30 a.m., Saturday, 9:00 a.m.

September 3 and 6, 1997– Four Seasons Hotel, 98 San Jacinto Boulevard, September 4 and 5, 1997, Ex-Student's Association, UT Campus, 2110 San Jacinto

Austin

Board of Regents

AGENDA:

The Board of Regents will meet in Open Session to conduct workshops with the component presidents and staff to review strategic plans and missions, enrollments, fiscal resources, faculty and staff development, academic and research program plans, operating efficiency and effectiveness and private fund development issues. It is not anticipated that these will be decision-making sessions but, instead, will be learning and information gathering sessions for the board.

If necessary or appropriate, the Board may recess for brief executive sessions to discuss personnel matters relating to the evaluation , assignment, or duties of officers or employees (Texas Government Code, §551.074) as a part of these component reviews. It is not anticipated that any formal action or decisions will result from these brief executive sessions.

Contact: Arthur H. Dilly, 201 West Seventh Street, Austin, Texas 78701-2981, (512) 499–4402.
Filed: August 27, 1997, 9:19 a.m.

TRD-9711330

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University of North Texas/University of North Texas Health Science Center

Thursday, August 28, 1997, 1:30 p.m.

Avenue C at Chestnut, Administration Building, Room 201

Denton

Board of Regents, Role and Scope Committee

AGENDA:

UNT: Personnel Transactions; Tenure for New Faculty Appointees; Supplemental Promotion Recommendation for 1997–1998; Faculty on Modified Service, 1996–1997; Small Class Report, Summer II, 1997; UNT Policy Manual; Establishment of Holidays for FY 1997–1998; Revised Policy for Admission of New Freshmen; Tenure Projections; Name of Role and Scope Committee.

UNTHSC: Emeritus Recommendation; Department of Molecular Biology and Immunology; Health Science Center Manuals, Policies and Bylaws; Holiday Schedule

Contact: Jana Dean, P.O. Box 13737, Denton, Texas 76203, (940) 369–8515.
Filed: August 25, 1997, 11:36 a.m.

TRD-9711216

♦ ♦ ♦

Thursday, August 28, 1997, 1:30 p.m.

Avenue C at Chestnut, Administration Building, Board Room

Denton

Board of Regents, Budget and Finance Committee

AGENDA:

UNT: [Executive session; Evaluation of Internal Auditors]; Technology Use Fee (Computer Use Fee); Resolution Authorizing the Issuance of Consolidated University Revenue Bonds, Series 1997A, and Resolving Other Matters Related Thereto; 1997–1998 Budget Recommendation; Internal Audit Plan, Fiscal Year 1998; Scholarships for Professional Development Institute (PDI), Foundation, and Alumni Association Employees and Dependents; Gift Report; Quarterly Investment Report; Investment Report; Internal Audit Update; Drink Vending Contract; Athletic Benchmarks.

Contact: Jana Dean, P.O. Box 13737, Denton, Texas 76203, (940) 369–8515.
Filed: August 25, 1997, 11:36 a.m.

TRD-9711217

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Thursday, August 28, 1997, 3:30 p.m.

Avenue C at Chestnut, Administration Building, Room 201

Denton

Board of Regents, Facilities Committee

AGENDA:

UNT: Speech and Drama Building Renovation; Administration Building Renovation; Restroom Improvements—Business Administration Building, Matthews Hall, and Wooten Hall; Project Status Report; Utilities Rate Reduction; Union Food Court and Bookstore Renovation; Purchase of Property, Radisson Denton Hotel and Conference Center.

UNTHSC: Project Status Report.

Contact: Jana Dean, P.O. Box 13737, Denton, Texas 76203, (940) 369–8515.
Filed: August 25, 1997, 11:37 a.m.

TRD-9711218

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Thursday, August 28, 1997, 3:30 p.m.

Avenue C at Chestnut, Administration Building, Board Room

Denton

Board of Regents, Advancement Committee

AGENDA:

UNT: Gift Report; Capital Campaign Update; New Initiatives; Public Affairs Update; Athletics Update.

UNTHSC: Gift Report; UNTHSC/TCOM Foundation Update

Contact: Jana Dean, P.O. Box 13737, Denton, Texas 76203, (940) 369–8515.
Filed: August 25, 1997, 11:37 a.m.

TRD-9711219

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Friday, August 29, 1997, 8:00 a.m.

Diamond Eagle Suite, University Union, University of North Texas

Denton

Board of Regents

AGENDA:

UNT: App. of Min.; (UNT/UNTHSC Exec. Session; Austin Update: UNTHSC: Affiliations; Legal Briefing; UNT: Board of Regents Retreat; Higher Educational Southern Dallas Task Force; Athletics Update; Legal Briefing; Title IX Issue; Evaluation of Internal Auditors; History Personnel Issue; TAMS Student Issue; Evaluation of Chancellor; Personnel Transactions; Tenure for New Faculty Appointees; Supp. Prom. Rec. for 1997–1998; Fac. on Mod. Svc., 1996–1997; Small Class Report, Summer II, 1997; UNT Policy Manual; Establishment of Holidays for FY 1997–1998; Revised Policy for Admission of New Freshmen; Technology Use Fee (Computer Use Fee); Resolution Authorizing the Issuance of Consolidated University Revenue Bonds, Series 1997A, and Resolving Other Matters Related Thereto; 1997–1998 Budget Recommendation; Internal Audit Plan, Fiscal Year 1998; Scholarships for Professional Development Institute (PDI), Foundation, and Alumni Association Employees and Dependents; Gift Report; Quarterly Investment Report; Speech and Drama Building Renovation; Administration Building Renovation; Restroom Improvements; Business Administration Building; Matthews Hall and Wooten Hall; Project Status Report; Chancellor's Update on the Dallas Education Center.

UNTHSC: App of Min.; Emeritus Recommendation; Department of Molecular Biology and Immunology; Health Science Center Manuals, Policies and Bylaws; Holiday Schedule; Course Fees for Physician Assistant Students; 1997–1998 Budget Recommendation; Internal Audit Plan for the 1998 Fiscal Year; Gift Report; Quarterly Report; Project Status Report; President's Update on John Peter Smith Hospital and Columbia; Election of Officers.

Contact: Jana Dean, P.O. Box 13737, Denton, Texas 76203, (940) 369–8515.
Filed: August 25, 1997, 11:36 a.m.

TRD-9711215

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Friday, August 29, 1997, 8:00 a.m.

Diamond Eagle Suite, University Union, University of North Texas

Denton

Board of Regents

EMERGENCY REVISED AGENDA:

UNT: App. of Min.; (UNT/UNTHSC Exec. Session; Austin Update: UNTHSC: Affiliations; Legal Briefing; UNT: Board of Regents Retreat; Higher Educational Southern Dallas Task Force; Athletics Update; Legal Briefing; Title IX Issue; Evaluation of Internal Auditors; History Personnel Issue; TAMS Student Issue; Evaluation of Chancellor; Personnel Transactions; Tenure for New Faculty Appointees; Supp. Prom. Rec. for 1997–1998; Fac. on Mod. Svc., 1996–1997; Small Class Report, Summer II, 1997; UNT Policy Manual; Establishment of Holidays for FY 1997–1998; Revised Policy for Admission of New Freshmen; Technology Use Fee (Computer Use Fee); Resolution Authorizing the Issuance of Consolidated University Revenue Bonds, Series 1997A, and Resolving Other Matters Related Thereto; 1997–1998 Budget Recommendation; Internal Audit Plan, Fiscal Year 1998; Scholarships for Professional Development Institute (PDI), Foundation, and Alumni Association Employees

and Dependents; Gift Report; Quarterly Investment Report; Speech and Drama Building Renovation; Administration Building Renovation; Restroom Improvements; Business Administration Building; Matthews Hall and Wooten Hall; Project Status Report; Chancellor's Update on the Dallas Education Center.

UNTHSC: App of Min.; Emeritus Recommendation; Department of Molecular Biology and Immunology; Health Science Center Manuals, Policies and Bylaws; Holiday Schedule; Course Fees for Physician Assistant Students; 1997–1998 Budget Recommendation; Internal Audit Plan for the 1998 Fiscal Year; Gift Report; Quarterly Report; Project Status Report; President's Update on John Peter Smith Hospital and Columbia; Election of Officers.

REASON FOR EMERGENCY: Vending Contract negotiations have reached the point that Board must be promptly and fully informed about contract.

Contact: Jana Dean, P.O. Box 13737, Denton, Texas 76203, (940) 369–8515.
Filed: August 28, 1997, 12:59 p.m.

TRD-9711386

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Texas Workforce Commission

Wednesday, September 3, 1997, 9:00 a.m.

101 East 15th Street, TWC Building, Room 644

Austin

AGENDA:

Prior meeting notes; Public Comment; Staff reports and discussion, update on activities relating to Administration Division, Finance Division, Information Systems Division, Skills Development and Self-Sufficiency Funds, Unemployment Insurance Division, School-To-Work, Welfare-To-Work/Child Care Programs, and Workforce Division, and other activities as determined by the Executive Director; Consideration and action on tax liability cases listed on Texas Workforce Commission Docket 36; Discussion, consideration and possible action relating to House Bill 2777 and the development and implementation of a plan for the integration of services and functions relating to eligibility determination and service delivery by health and human services agencies and TWC; Discussion, consideration and possible action on acceptance of donation of child care matching funds from Odessa Family YMCA, Child Development Council of Brazoria, Kids Enterprise I and II, Amarillo Community Center, Inc., Catholic Family Services, Young Woman's Christian Association, Inc., Early Learning Center, Inc., Love and Learning Center of Milam County, Denton ISD, West Orange Cove Consolidated, Inc., United Way of El Paso County, and Glorias Day Care; Discussion regarding new agency organizational structure for monitoring function; Discussion, consideration and possible action on publication in the Texas Register of Proposed amendments to TWC allocation rule (40 TAC §§800.51–800.60); Discussion, consideration and possible action regarding proposed rule relating to the Self-Sufficiency Fund and Related matters; Discussion, consideration and possible action on adoption of proposed changes to TWC rule relating to the Skills Development Fund (40 TAC §803.1); Presentation, discussion and possible action relating to the Child Care Matching Fund process and the role of Local Workforce Development Boards and the use of lapsing federal funds from fiscal year 1997 for locally matched child care initiatives; Discussion, consideration and possible action on publication in the Texas Register of proposed incentive and sanction rule for Local Workforce Boards; Discussion of Governance structures for Local Workforce Development Boards and related matters; Discussion of revision of rules related to the TANF employment program; Discussion, consideration and possible action regarding potential and pending applications for certification and recommendations to the Governor of Local Workforce Development Boards for Certification; Discussion, consideration and possible action regarding recommendations to TCWEC and status of strategic and operational plans submitted by Local Workforce Development Boards; Discussion, consideration and possible action relating to the Commission's policy and criteria relating to appointment and reappointment of Local Workforce Development Board or Private Industry Council nominees; Discussion, consideration and possible action regarding approval of Local Workforce board or Private Industry Council nominees; Executive session pursuant to Government Code §551.074 to discuss personnel matters with executive staff and pursuant to Government Code §551.071(2) to consult with its attorney concerning the Open Meetings Act and Commission administrative procedures; Actions, if any, resulting from executive session; Consideration and action on whether to assume continuing jurisdiction on Unemployment Compensation cases and reconsideration of Unemployment Compensation cases, if any; Discussion regarding standards of proof in unemployment benefits cases involving drug testing; Consideration and action on higher level appeals in Unemployment Compensation cases listed on Texas Workforce Commission Dockets 35 and 36; and Set date of next meeting.

Contact: J. Randel (Jerry) Hill, 101 East 15th Street, Austin, Texas 78778, (512) 463–7833.
Filed: August 26, 1997, 2:36 p.m.

TRD-9711290

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Regional Meetings

Meetings filed August 25, 1997

Austin-Travis County MHMR Center, Board of Trustees, met at 1430 Collier Street, Board Room, Austin, August 28, 1997 at 5:00 p.m. Information may be obtained from Sharon Taylor, 1430 Collier Street, Austin, Texas 78704, (512) 440–4031. TRD-9711226.

Bastrop Central Appraisal District, Appraisal Review Board, met at 1200 Cedar Street, Bastrop, August 28, 1997 at 8:30 a.m. Information may be obtained from Dana Ripley, 1200 Cedar Street, Bastrop, Texas 78602, (512) 303–3536. TRD-9711234.

Capital Area Rural Transportation System (CARTS), Executive Committee, met at 2010 East Sixth Street, Austin, August 29, 1997 at 1:00 p.m. Information may be obtained from Edna M. Burroughs, P.O. Box 6080, Austin, Texas 78702, (512) 389–1011. TRD-9711207.

Education Service Center, Region XI, Board of Directors, met at 3001 North Freeway, Fort Worth, August 25, 1997 at 10:00 a.m. Information may be obtained from Dr. Ray L. Chancellor, 3001 North Freeway, Fort Worth, Texas 76106, (817) 625–5311. TRD-9711556.

North Central Texas Council of Governments, Transportation Department, Regional Transportation Council, will meet at Irving City Hall, City Council Chambers, 825 West Irving Boulevard, Irving, Septem-

ber 9, 1997 at 9:30 a.m. Information may be obtained from Michael Morris, P.O. Box 5888, Arlington, Texas 76005–5888, (817) 695–9240. TRD-9711230.

North Central Texas Council of Governments, Transportation Department, Regional Transportation Council, will meet at Hurst City Hall, Court Room, 1501 Precinct Line rroad, Hurst, September 10, 1997 at 2:00 p.m. Information may be obtained from Michael Morris, P.O. Box 5888, Arlington, Texas 76005–5888, (817) 695–9240. TRD-9711231.

North Central Texas Council of Governments, Transportation Department, Regional Transportation Council, will meet at North Central; Texas Council of Governments, Third Floor, Transportation Board Room, 616 Six Flags Drive, Arlington, September 29, 1997 at 2:00 p.m. Information may be obtained from Michael Morris, P.O. Box 5888, Arlington, Texas 76005–5888, (817) 695–9240. TRD-9711232.

Northeast Texas Municipal Water District, Board of Directors, met at Highway 250 South, Hughes Springs, August 28, 1997 at 2:00 p.m. Information may be obtained from Roy A. Nail, Box 955, Hughes Springs, Texas 75656, (903) 639–7538. TRD-9711227.

North Texas Regional Library System, Board of Directors, will meet at Roanoke Community Center, Roanoke, September 25, 1997 at 10:00 a.m. Information may be obtained from Cynthia Brown, 1111 Foch Street, Suite 100, Fort Worth, Texas 76107, (817) 335–6076. TRD-9711223.

Nueces River Authority, Finance Committee, met at 555 South Alamo Street, San Antonio, August 29, 1997 at 9:00 a.m. Information may be obtained from Con Mims, P.O. Box 349, Uvalde, Texas 78802, (830) 278–6810. TRD-9711210.

Nueces River Authority, Board of Directors, met at 555 South Alamo Street, San Antonio, August 29, 1997 at 9:30 a.m. Information may be obtained from Con Mims, P.O. Box 349, Uvalde, Texas 78802, (830) 278–6810. TRD-9711220.

Panhandle Regional Planning Commission, Board of Directors, met at 415 West Eighth Avenue, Amarillo, August 28, 1997 at 1:30 p.m. Information may be obtained from Rebecca Rusk, P.O. Box 9257, Amarillo, Texas 79105, (806) 372–3381. TRD-9711245.

Tarrant Appraisal District, Appraisal Review Board, will meet at 2329 Gravel Road, Fort Worth, September 16–17, 1997 at 8:00 a.m. Information may be obtained from Linda G. Smith, 2329 Gravel Road, Fort Worth, Texas 76118–6984, (817) 284–8884. TRD-9711213.

Taylor County Central Appraisal District, Appraisal Review Board, will meet at 1534 South Treadaway, Abilene, September 8, 9, 10, 11, 1997, 1:30 p.m. Information may be obtained from Richard Petree, P.O. Box 1800, Abilene, Texas 79604, (915) 767–9381, extension 24. TRD-9711246.

Meetings filed August 26, 1997

Education Service Center, Region 16, Board of Directors, met at 1601 South Cleveland, Amarillo, August 29, 1997 at 1:15 p.m. Information may be obtained from Darrell L. Garrison, P.O. Box 30600, Amarillo, Texas 79120, (806) 376–5521, ext.272. TRD-9711261.

Local Government Investment Cooperative, Board of Directors, will meet at 1201 Elm Street, Suite 3500, Dallas, September 5, 1997 at 2:00 p.m. Information may be obtained from Patrick Shinkle, 1201 Elm Street, Suite 3500, Dallas, Texas 75270, (214) 672–6784, fax: (214) 672–6775. TRD-9711278.

San Antonio-Bexar County Metropolitan Planning Organization, Bicycle Mobility Task Force, met at 114 West Commerce, "B" Room, Municipal Plaza Building, San Antonio, September 3, 1997 at 4:00 p.m. Information may be obtained from Janet A. Kennison, 603 Navarro, Suite 904, San Antonio, Texas 78205, (210) 227–8651. TRD-9711317.

Scurry County Appraisal District, Board of Directors, met at 2612 College Avenue, Snyder, September 2, 1997, at 8:00 a.m. Information may be obtained from L.R. Peveler, 2612 College Avenue, Snyder, Texas 79549, (915) 573–8549. TRD-9711268.

Scurry County Appraisal District, Board of Directors, met at 2612 College Avenue, Snyder, September 2, 1997, at 8:30 a.m. Information may be obtained from L.R. Peveler, 2612 College Avenue, Snyder, Texas 79549, (915) 573–8549. TRD-9711267.

West Central Texas Council of Governments Area Agency on Aging, Regional Citizens Advisory Committee, met at 1025 East North 10th Street, September 4, 1997 at 10:00 a.m. Information may be obtained from Brad Helbert, 1025 EN 10th Street, Abilene, Texas 79601, (915) 672–8544. TRD-9711280.

Meetings filed August 27, 1997

Brazos Valley Development Council, Regional Advisory Committee on Aging, met at 1706 East 29th Street, Bryan, September 2, 1997 at 2:30 p.m. Information may be obtained from Roberta Lindquist, P.O. Drawer 4128, Bryan, Texas 77805–4128, (409) 775–4244. TRD-9711352.

East Texas Council of Governments, Workforce Development Board, met at 1306 Houston Street, Kilgore, September 4, 1997, 9:00 a.m. Information may be obtained from Glynn Knight, 3800 Stone Road, Kilgore, Texas, 75662, (903) 984–8641. TRD-9711368.

Gillespie Central Appraisal District, Board of Directors, met at Gillespie County Courthouse, District Courtroom, 101 West Main Street, Fredericksburg, September 4, 1997 at 8:00 a.m. Information may be obtained from Wendy J. Garza, P.O. Box 429, Fredericksburg, Texas 78624, (830) 997–9807. TRD-9711357.

Lavaca County Central Appraisal District, Board of Directors, will meet at 113 North Main Street, Hallettsville, September 8, 1997 at 4:00 p.m. Information may be obtained from Diane Munson, P.O. Box 386, Hallettsville, Texas 77964, (512) 798–4396. TRD-9711353.

North Central Texas Council of Governments, Executive Board, met at Centerpoint Two, 616 Six Flags Drive, Second Floor, Arlington, August 28, 1997 at 12:45 p.m. Information may be obtained from Edwina J. Shires, P.O. Box 5888, Arlington, Texas 76005–5888, (817) 640–3300. TRD-9711329.

Meetings filed August 28, 1997

Bastrop Central Appraisal District, Board of Directors, met at 1200 Cedar Street, Bastrop, September 4, 1997 at 7:30 p.m. Information may be obtained from Dana Ripley, 1200 Cedar Street, Bastrop, Texas 78602, (512) 303–3536. TRD-9711372.

Dawson County Central Appraisal District, Board of Directors, met at 1806 Lubbock Highway, Lamesa, September 3, 1997 at 7:00 a.m. Information may be obtained from Tom Anderson, P.O. Box 797, Lamesa, Texas 79331, (806) 872–7060. TRD-9711381.

East Texas Council of Governments, Executive Committee, met at 3800 Stone Road, Kilgore, September 4, 1997 at 12:30 p.m. Information may be obtained from Glynn Knight, 3800 Stone Road, Kilgore, Texas, 75662, (903) 984–8641. TRD-9711390.

Northeast Texas Rural Rail Transportation District, Board, met at Greenville Municipal Building, 2821 Washington Street, Greenville, September 3, 1997 at 3:00 p.m. Information may be obtained from Sue Ann Harting, 2821 Washington Street, Greenville, Texas 75401, (903) 450–0140. TRD-9711391.

North Texas Tollway Authority, Board of Directors, met at Dallas/ Fort Worth Airport Marriott, 8440 Freeport Parkway, Irving, September 3, 1997, 9:30 a.m. Information may be obtained from Jimmie G. Newton, 3015 Raleigh Street, Dallas, Texas 75219, (214) 522–6200. TRD-9711376.

Central Appraisal District of Rockwall County, Appraisal Review Board, met at 106 North San Jacinto, Rockwall, September 2, 1997 at 8:30 a.m. Information may be obtained from Ray E. Helm, 106 North San Jacinto, Rockwall, Texas, 75087, (972) 771–2034. TRD-9711382.

Central Appraisal District of Rockwall County, Appraisal Review Board, met at 106 North San Jacinto, Rockwall, September 4, 1997 at 8:30 a.m. Information may be obtained from Ray E. Helm, 106 North San Jacinto, Rockwall, Texas, 75087, (972) 771–2034. TRD-9711383.

Shackelford Water Supply, Director's Meeting, met at September 3, 1997 at Noon. Information may be obtained from Gaynell Perkins, Box 11, Albany, Texas, 76430, (915) 762–2575. TRD-9711379.

Tyler County Appraisal District, Board of Directors, will meet at 806 West Bluff, September 9, 1997 at 10:00 a.m. Information may be obtained from Eddie Chalmers, P.O. Drawer 9, Woodville, Texas 75979, (409) 283–3736. TRD-9711392.

Meetings filed August 29, 1997

Bluebonnet Trails Community MHMR Center, Board of Trustees, met at Bluebonnet Trails Community MHMR Center, 15800 Highway 620 North, Austin, September 4, 1997, 4:00 p.m. Information may be obtained from Vicky Risley, 15800 Highway 620 North, Austin, Texas 78717, (512) 244–8335. TRD-9711449.

Deep East Texas Council of Governments, Regional 9–1–1– Advisory Council, will meet at Holiday Inn, 4306 South First Street, Highway 59S, Lufkin, September 16, 1997 at 10:00 a.m. Information may be obtained from Everette D. Alfred, 274 East Lamar, Jasper, Texas 75951, (409) 384–5704. TRD-9711446.

50th Judicial District, Juvenile Board, met at District Courtroom, Cottle County Courthouse, Paducah, September 4, 1997 at Noon. Information may be obtained from David W. Hajek, P.O. Box 508, Seymour, Texas 76380, (817) 888–2852. TRD-9711433.

Hunt County Appraisal District, Board of Directors, met at 4801 King Street, Greenville, September 4, 1997 at Noon. Information may be obtained from Shirley Smith, P.O. Box 1339, Greenville, Texas 75403, (903) 454–3510. TRD-9711458.

Panhandle Ground Water Conservation District Three, Board of Directors Public Meeting, was held at District Office, White Deer, September 4, 1997 at 7:30 p.m. Information may be obtained from C.E. Williams, Box 637, White Deer, Texas 79097, (906) 883–2501. TRD-9711434.

Riceland Regional Mental Health Authority, Board of Trustees, met at 4910 Airport, Rosenberg, September 4, 1997 at 9:00 a.m. Information may be obtained from Marjorie Dornak, P.O. Box 869, Wharton, Texas 77488, (409) 532–3098. TRD-9711412.

Stephens County Rural Water Supply Corporation, Monthly meeting, was held at 301 West Elm Street, Breckenridge, September 4, 1997 at 7:00 p.m. Information may be obtained from Mary Barton, P.O. Box 1621, Breckenridge, Texas 76424, (254) 559–6180. TRD-9711455.

Wood County Appraisal District, Board of Directors, met at 210 Clark Street, Quitman, September 4, 1997 at 1:30 p.m. Information may be obtained from W. Carson Wages or Rhonda Powell, P.O. Box 518, Quitman, Texas 75783–0518, (903) 763–4891. TRD-9711456.

IN ADDITION

The ***Texas Register*** is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC 501. Requests for federal consistency review were received for the following projects(s) during the period of August 25, 1997, through August 28, 1997:

FEDERAL AGENCY ACTIONS:

Applicant: Reading and Bates Development Company; Location: Offshore, State Tract 118, Galveston Bay, Chambers County, Texas.; Project Number: 97-0265-F1; Description of Proposed Action: The applicant proposes to install, operate, and maintain structures and equipment for oil and gas drilling, production, and transportation activities.; Type of Application: U.S.C.O.E. permit application #21062 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403), and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Louisiana Ship, Inc.; Location: Greens Bayou, approximately 1.3 miles upstream from Buffalo Bayou, Houston, Harris County, Texas; Project Number: 97-0267-F1; Description of Proposed Action: The applicant requests a 10-year extension of permit #19864, formerly issued under Platzer Shipyards, Inc.; Type of Application: U.S.C.O.E. permit application #19864 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action should be referred to the Coastal Coordination Council for review and whether the action is or is not consistent with the Texas Coastal Management Program goals and policies. All comments must be received within 30 days of publication of this notice and addressed to Janet Fatheree, Council Secretary, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495.

Issued in Austin, Texas, on August 28, 1997.

TRD-9711430
Garry Mauro
Chairman, Coastal Coordination Council
Coastal Coordination Council
Filed: August 29, 1997

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas EthicsCommission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Kristin Newkirk at (512) 463-5800 or (800) 325-8506.

Deadline: Annual Personal Financial Statement due April 30, 1997

Brian M. Boales, CNA Risk Management Group, P.O. Box 105279, Atlanta GA 30348-0279

Ygnacio D. Garza, P.O. Box 2135, Brownsville, TX 78520

Norberto Salinas Sr., 2114 Colorado, Mission, TX 78572

Robert E. Parrish, 3003 Rambling Dr., Dallas, TX 75228

Vidal G. Martinez, Hughes and Luce LLP, 333 Clay Ave. #3800, Houston, TX 77002

Susan B. Place, 5509 Pleasant Valley, Plano, TX 75023

Weldon Traylor Sr., Traylor and Assoc., P.O. Box 14112, Houston, TX 77021

Hilda Medrano, 600 Water Lilly, McAllen, TX 78504

Winona W. Miles, Rt. 5 Box 258 A, Gatesville, TX 76528

Laurence D. Miller III, Baluarte Creek, Inc., P.O. Box 49130, Austin, TX 78765-9130

Carole A. Woodard, P.O. Box 660, Galveston, TX 77553

Paul K. Herder, 4202 Hwy 90 E, San Antonio, TX 78219

Diana Marshall, Schechter and Marshall, 3200 Travis St., Houston, TX 77006

Roseanna C. Davidson, College Of Education Texas, P.O. Box 41071, Lubbock, TX 79409-1071

Lukin T. Gilliland Jr., 901 NE Loop 410 #909, San Antonio, TX 78209

Laresa Smith, 232 East Davis, Kerrville, TX 78028

Cloyd O. Hadnot, P.O. Box 565, Hillister, TX 77624

Ruben Espronceda, P.O. Box 14373, San Antonio, TX 78214

Michael L. Williams, 2604 Garden Ridge Lane, Arlington, TX 76006

Willard L. Jackson Jr., Metroplex Ind. Inc., 3555 Timmons #1000, Houston, TX 77027

Teri H. Mathis, 1010 Baker Rd., Rosenberg, TX 77471

Juan E. Blackburn, P.O. Box 38, Spearman, TX 79081

Billy Clemons, P.O. Box 3206, Lufkin, TX 75903-3206

Sergio Munoz, 707 Conway, Mission, TX 78572

Issued in Austin, Texas, on August 22, 1997.

TRD-9711222
Tom Harrison
Executive Director
Texas Ethics Commission
Filed: August 25, 1997

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Health and Human Services Commission

Public Notice

The Health and Human Services Commission State Medicaid Office has received approval from the Health Care Financing Administration to amend the Title XIX Medical Assistance Plan by Transmittal Number 96-18, Amendment Number 519.

The amendment clarifies current nursing facility (NF) reimbursement methodology practices. The amendment is effective September 1, 1996.

If additional information is needed, please contact Pam McDonald, Texas Department of Human Services, at (512) 438-4086.

Issued in Austin, Texas, on August 22, 1997.

TRD-9711350
Marina S. Henderson
Executive Deputy Commissioner
Health and Human Services Commission
Filed: August 27, 1997

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Texas Department of Human Services

Public Notice

The Texas Department of Human Services (TDHS) has published a report outlining the intended use of federal block grant funds during fiscal year 1998 for Title XX social services programs administered by the Texas Department of Human Services, the Texas Department of Health, the Texas Department of Protective and Regulatory Services, and the Texas Workforce Commission. The report describes department services funded through this federal source and includes a distribution-of-funds section which provides financial information on the allocation of funds to all social services. On June 26, the proposed Intended Use Report was made available to the public for review and comment. No comments were received. TDHS received and responded to requests for copies of the report.

To obtain free copies of the report: Send a written request to Elisa Hendricks, Government Relations Division, Mail Code W-623, Texas Department of Human Services, P.O. Box 149030, Austin, Texas 78714-9030.

Issued in Austin, Texas, on August 28, 1997.

TRD-9711380
Glen Scott
Agency Liaison
Texas Department of Human Services
Filed: August 28, 1997

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Texas Department of Insurance

Insurer Services

The following applications have been filed with the Texas Department of Insurance and are under consideration:

Application for admission in Texas for Texas Bonding Company, assumed name in Texas for American Contractors Indemnity Company, a foreign fire and casualty company. The home office is in Los Angeles, California.

Application by Frontier Insurance Company, a foreign fire and casualty company, to drop its assumed name in Texas, Frontier Insurance Company of New York. The home office is in Rock Hill, New York.

Application for a name change in Texas for Consumers Life Insurance Company of North Carolina, a domestic life, accident and health company. The proposed new name is SafeHealth Life Insurance Company, Inc. The home office is in Dallas, Texas.

Any objections must be filed within 20 days after this notice was filed with the Texas Department of Insurance, addressed to the attention of Cindy Thurman, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

Issued in Austin, Texas, on August 28, 1997.

TRD-9711432
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: August 29, 1997

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of John Hancock Signature Services, Inc., a foreign third party administrator. The home office is Wilmington, Delaware.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711233
Bernice Ross
Deputy Chief Clerk
Texas Department of Insurance
Filed: August 25, 1997

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Notice of Amendment of a Consulting Services Contract

The Texas Natural Resource Conservation Commission (TNRCC) furnishes this notice of an amendment of a consulting services contract which was awarded for tasks necessary to provide information and advice to the CCBNEP, regarding how to effect maximum local stakeholder (groups and individuals) involvement and input for the development of the Comprehensive Conservation and Management Plan (CCMP). The notice for request for proposals was published in the July 5, 1996, issue of the *Texas Register*.

Description of Services. This contract is for consulting services for the gathering and evaluation of information from identified local stakeholders associated with the 13 Action Plan Task Forces of the Corpus Christi Bay National Estuary Program (CCBNEP). The Consultant will then make recommendations to the 13 Action Plan Task Forces and the CCBNEP Management Conference. The following major products will be produced: Quarterly Reports, Draft Report, Final Report, February 28, 1998.

Effective Date and Value of Contract. This amendment is a no cost contract extension of the contract from the original termination date of August 31, 1997 to a new termination date of March 31, 1998. The amendment will make the contract effective from January 28, 1997, until March 31, 1998. The total cost of the contract is the same original, $30,000.

Name of the Contractor. The contract has been awarded to the Coastal Bend Bays Foundation.

Persons who have questions concerning this award may contact Richard Volk, Corpus Christi Bay National Estuary Program, Natural Resources Center, Suite 3300, 6300 Ocean Drive, Corpus Christi, Texas 78412, (512) 980-3420.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711431
Kevin McCalla
Director, Legal Division
Notice of Amendment of a Consulting Services Contract
Filed: August 29, 1997

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Texas Natural Resource Conservation Commission

Notice of Award

The Texas Natural Resource Conservation Commission ("TNRCC"), under the authority granted in the Consulting Services Procurement Act (the "Act"), Texas Government Code, §2254, Subchapter B, has entered into a major consulting services contract. Pursuant to §2254.030 of Subchapter B, the TNRCC is required to publish notice of this contract in the *Texas Register*.

The Request for Proposal for this contract was published in the *Texas Register* on July 8, 1997, (22 TexReg 6487).

The Consultant will provide an assessment of employee pollution prevention awareness and knowledge within the TNRCC and develop a pollution prevention integration plan for the agency at a cost not to exceed forty thousand dollars ($40,000).

The Private Consultant who is a party to this contract with the TNRCC is: Kerr and Associates, 2634 Wild Cherry Place, Reston, VA 20191, 703-476-0710, 703-476-0711 (fax).

The total value of the Contract is: $40,000.00. The beginning and ending dates of the contract are: September 1, 1997 through August 31, 1998 (or sooner).

The dates upon which assessments, reports, surveys, and / or documents are due to the agency are: Various throughout the twelve month period of the contract, but in no event later than August 31, 1998.

Issued in Austin, Texas, on August 29, 1997.

TRD-9711443
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Filed: August 29, 1997

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Notification of Consulting Services Contract Amendment

The Texas Natural Resource Conservation Commission (TNRCC) announces that it has amended a contractual agreement on August 20, 1997 with the Board of Regents for the University and Community College System of Nevada on Behalf of the Desert Research Institute (DRI) to perform consulting services for the Texas 1996 Remote Sensing Feasibility Study. The sole purpose of this amendment is to extend the termination date for the contract to August 31, 1997. The original contract amount of $214,098 has not been revised by this amendment.

Consistent with Government Code, Chapter 2254, the Consultant Proposal Request for these services had been included in the March 19, 1996 issue of the *Texas Register*. The notification that DRI had been selected and that the original contract had been signed was included in the July 19, 1996 issue of the *Texas Register* . DRI's complete name and business address is: Desert Research Institute, Energy and Environmental Engineering Center, 5625 Fox Avenue, Reno, Nevada 89506-0220.

Upon completion of the contract, copies of all reports produced by DRI will be filed with the Texas State Library. Parties with specific

inquiries about this consulting services contract should contact Kerri Rowland of the TNRCC Legal Division at (512) 239-5693.

Issued in Austin, Texas, on August 29, 1997.

TRD-9711444
Kevin McCalla
Director, Legal Division
Texas Natural Resource Conservation Commission
Filed: August 29, 1997

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North Central Texas Council of Governments

Notice of Consultant Contract Award

Pursuant to the provisions of Government Code, Chapter 2254, the North Central Texas Council of Governments publishes this notice of consultant contract award. The consultant proposal request appeared in the June 27, 1997, issue of the *Texas Register* (22 TexReg 6131). The selected consultant will refine a bus ridership estimation model and conduct market research for parking and rail feeder bus needs for the Dallas Area Rapid Transit (DART).

The consultant selected for this project is NuStats International, 3006 Bee Caves Road, Suite A-300, Austin, Texas 78746. The maximum amount of this contract is $98, 048. The contract began September 1, 1997 and will terminate on February 27, 1998.

Issued in Arlington, Texas, on August 26, 1997.

TRD-9711378
R. Mike Eastland
Executive Director
North Central Texas Council of Governments
Filed: August 28, 1997

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Texas Parks and Wildlife Department

Annual Meeting of Gulf States Marine Fisheries Commission

The Gulf States Marine Fisheries Commission will hold its 47th Annual Spring Meeting October 13-17, 1997. Alabama is the host state and arrangements have been made to convene at the Quality Inn Beachside, 931 West Beach Boulevard, Gulf Shores, AL (1-800-844-6914, Ext. 302). All persons interested in the Gulf States Marine Fisheries Commission are invited to attend. For additional information please call Virginia K. Herring (601) 875-5912.

Issued in Austin, Texas, on August 27, 1997.

TRD-9711355
Bill Harvey
Regulatory Corrdinator
Texas Parks and Wildlife Department
Filed: August 27, 1997

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Texas State Board of Pharmacy

Election of Officers

The Texas State Board of Pharmacy announces the election of the following officers to serve from September 1, 1997 to August 31, 1998: Susan Jacobson, President; Oren Peacock, R.Ph., Vice President; Roberta High, R.Ph., Treasurer.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711367
Gay Dodson, R.Ph.
Acting Executive Director/Secretary
Texas State Board of Pharmacy
Filed: August 27, 1997

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Texas Public Finance Authority

Request for Proposals for Underwriting Services

The Texas Public Finance Authority (the "Authority") is requesting proposals for underwriting services. The deadline for proposal submission is 2:00 p.m., September 11, 1997.

The Authority's Board of Directors (the "Board") will make its selection based upon its evaluation of firms best qualified to serve the interests of the State and the Authority. By the Request for Proposal, however, the Board has not committed itself to select underwriting firms. The Board reserves the right to negotiate individual elements of a proposal and to reject any and all proposals.

Copies of the Request For Proposal may be obtained by calling or writing Marce Watkins or Jeanine Barron, Texas Public Finance Authority, P.O. Box 12906, Austin, Texas 78711, (512) 463-5544.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711224
Kimberly K. Edwards
Executive Director
Texas Public Finance Authority
Filed: August 25, 1997

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Public Utility Commission of Texas

Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on August 14, 1997, for a service provider certificate of operating authority (SPCOA), pursuant to §3.2532 of the Public Utility Regulatory Act of 1995. A summary of the application follows.

Docket Title and Number: Application of Page-Master, Etc. for a Service Provider Certificate of Operating Authority, Docket Number 17631 before the Public Utility Commission of Texas.

Applicant intends to resale local exchange service as a reseller of local exchange services in Fort Bend and Harris counties.

Applicant's requested SPCOA geographic area includes the geographic regions of Harris and Fort Bend counties.

Persons who wish to comment upon the action sought should contact the Public tility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer

Protection at (512) 936-7120 no later than September 10, 1997. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711308
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 26, 1997

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Notice is given to the public of the filing with the Public Utility Commission of Texas an application on August 26, 1997, for a service provider certificate of operating authority (SPCOA), pursuant to §3.2532 of the Public Utility Regulatory Act of 1995. A summary of the application follows.

Docket Title and Number: Application of Nationwide Communication for a Service Provider Certificate of Operating Authority, Docket Number 17682 before the Public Utility Commission of Texas.

Applicant intends to provide business and residential resold local telecommunications services throughout the state of Texas and to provide recurring flat rate local exchange service, EAS service, toll restrictions, call control options, tone dialing, custom calling services, Caller ID, and any other services which are available on a resale basis.

Applicant's requested SPCOA geographic area includes the counties of Harris, Fort Bend, Brazoria, and Galveston which are currently served by Southwestern Bell Telephone Company, GTE Southwest, Inc., Central Telephone Company of Texas, United Telephone Company of Texas, Inc., Sugarland Telephone Company, and Lufkin-Conroe Telephone Exchange, Inc.

Persons who wish to comment upon the action sought should contact the Public tility Commission of Texas, at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Consumer Affairs at (512) 936-7120 no later than September 10, 1997. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711312
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 26, 1997

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Notice of Intent to file Pursuant to Public Utlity Commission Substantaive Rule 23.27

Notice is given to the public of the intent to file with the Public Utility Commission of Texas an application pursuant to Public Utility Commission Substantive Rule 23.27 for a new PLEXAR-Custom service for Texas Tech Health Science Center - El Paso in El Paso, Texas.

Tariff Title and Number: Application of Southwestern Bell Telephone Company for a New PLEXAR-Custom Service for Texas Tech Health Science Center-El Paso in El Paso, Texas, Pursuant to Public Utility Commission Substantive Rule 23.27. Tariff Control Number 17875.

The Application: Southwestern Bell Telephone Company is requesting approval for a new PLEXAR-Custom service for Texas Tech Health Science Center-El Paso in El Paso, Texas. The geographic service market for this specific service is the El Paso local access and transport area.

Persons who wish to comment upon the action sought should contact the Public tility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711309
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 26, 1997

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Notice is given to the public of the intent to file with the Public Utility Commission of Texas an application pursuant to Public Utility Commission Substantive Rule 23.27 for a new PLEXAR-Custom service for Liberty County in Liberty, Texas.

Tariff Title and Number: Application of Southwestern Bell Telephone Company for a New PLEXAR-Custom Service for Liberty County in Liberty, Texas, Pursuant to Public Utility Commission Substantive Rule 23.27. Tariff Control Number 17876.

The Application: Southwestern Bell Telephone Company is requesting approval for a new PLEXAR-Custom service for Liberty County in Liberty, Texas. The geographic service market for this specific service is the Houston local access and transport area.

Persons who wish to comment upon the action sought should contact the Public tility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711310
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 26, 1997

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Notice is given to the public of the intent to file with the Public Utility Commission of Texas an application pursuant to Public Utility Commission Substantive Rule 23.27 for a new PLEXAR-Custom service for the City of Midland in Midland, Texas.

Tariff Title and Number: Application of Southwestern Bell Telephone Company for a New PLEXAR-Custom Service for the City of Midland in Midland, Texas, Pursuant to Public Utility Commission Substantive Rule 23.27. Tariff Control Number 17877.

The Application: Southwestern Bell Telephone Company is requesting approval for a new PLEXAR-Custom service for the City of Midland in Midland, Texas. The geographic service market for this specific service is the Midland local access and transport area.

Persons who wish to comment upon the action sought should contact the Public tility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or call the Commission's Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711311
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 26, 1997

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Public Notice of Interconnection Agreement

On August 6, 1997, Nextel of Texas, Inc. (Nextel) and GTE Southwest, Inc. (GTE-SW) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996 (FTA) (47 United States Code §§151 et. seq.) and the Public Utility Regulatory Act of 1995 (PURA) (Texas Revised Civil Statutes Annotated, Article 1446c-0, Vernon 1997). The joint application has been designated Docket Number 17769. The joint application and the underlying master resale agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17769. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 29, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17769.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711305
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 26, 1997

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On August 8, 1997, Ameritech Communications International, Inc. (ACI) and Southwestern Bell Telephone Company (SWBT) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the Federal Telecommunications Act of 1996 (FTA) (47 United States Code §§151 et. seq.) and the Public Utility Regulatory Act of 1995 (PURA) (Texas Revised Civil Statutes Annotated article 1446c-0, Vernon 1997). The joint application has been designated Docket Number 17782. The joint application and the underlying master resale agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of

the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17782. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 29, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17782.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711306
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 26, 1997

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On July 22, 1997, Southwestern Bell Telephone Company (SWBT) and Local Fone Service, Inc. (Local Fone) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the Federal Telecommunications Act of 1996 (FTA) (47 United States Code §§151 et. seq.) and the Public Utility Regulatory Act of 1995 (PURA95) (Texas Revised Civil Statutes Annotated, Article 1446c-0, Vernon 1997). The joint application has been designated Docket Number 17716. The joint application and the underlying master resale agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17716. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by September 29, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17716.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711307
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 26, 1997

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On August 19, 1997, Time Warner Communications of Austin, L.P., Time Warner Communications of Houston, L.P., and Fibrcom (TW)

and Southwestern Bell Telephone Company (SWBT) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act of 1995, Texas Revised Civil Statutes Annotated, Article 1446c-0 (Vernon 1997) (PURA). The joint application has been designated Docket Number 17836. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17836. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by October 6, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to Public Utility Commission Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17836.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711313
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 26, 1997

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On August 20, 1997, Progressive Concepts, Inc. (PCI) and Southwestern Bell Telephone Company (SWBT) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act of 1995, Texas Revised Civil Statutes Annotated, Article 1446c-0 (Vernon 1997) (PURA). The joint application has been designated Docket Number 17845. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17845. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by October 6, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to Public Utility Commission Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17845.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711314
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 26, 1997

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On August 20, 1997, Preferred Payphones, Inc. (PPI) and Southwestern Bell Telephone Company (SWBT) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act of 1995, Texas Revised Civil Statutes Annotated, Article 1446c-0 (Vernon 1997) (PURA). The joint application has been designated Docket Number 17852. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17852. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by October 6, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to Public Utility Commission Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17852.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711315
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 26, 1997

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Public Notice of Interconnection Agreement

On August 21, 1997, United Telephone Company of Texas, Inc., doing business as Sprint and Central Telephone Company of Texas doing business as Sprint (Sprint) and DMJ Communications (DMJ) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code)(FTA) and the Public Utility Regulatory Act of 1995, Texas Revised Civil Statutes Annotated, Article 1446c-0, (Vernon 1997) (PURA). The joint application has been designated Docket Number 17856. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17856. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by October 15, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to Public Utility Commission Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17856.

Issued in Austin, Texas, on August 28, 1997.

TRD-9711396
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 28, 1997

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On August 21, 1997, United Telephone Company of Texas, Inc., doing business as Sprint and Central Telephone Company of Texas doing business as Sprint (Sprint) and Lone Star Communications (Lone Star) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act of 1995, Texas Revised Civil Statutes Annotated, Article 1446c-0, (Vernon 1997) (PURA). The joint application has been designated Docket Number 17857. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17857. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by October 15, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to Public Utility Commission Procedural Rule

§22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17857.

Issued in Austin, Texas, on August 28, 1997.

TRD-9711397
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 28, 1997

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On August 21, 1997, United Telephone Company of Texas, Inc., doing business as Sprint and Central Telephone Company of Texas doing business as Sprint (Sprint) and EZ Talk Communications (EZ) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code)(FTA) and the Public Utility Regulatory Act of 1995, Texas Revised Civil Statutes Annotated, Article 1446c-0, (Vernon 1997) (PURA). The joint application has been designated Docket Number 17858. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17858. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by October 15, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to Public Utility Commission Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17858.

Issued in Austin, Texas, on August 28, 1997.

TRD-9711398
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 28, 1997

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On August 21, 1997, United Telephone Company of Texas, Inc., doing business as Sprint and Central Telephone Company of Texas doing business as Sprint (Sprint) and Texas Com South (TCS) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act of 1995, Texas Revised Civil Statutes Annotated article 1446c-0, (Vernon 1997) (PURA). The joint application has been designated Docket Number 17859. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommuni-

cations carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17859. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by October 15, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to Public Utilit Commission Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17859.

Issued in Austin, Texas, on August 28, 1997.

TRD-9711399
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 28, 1997

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On August 22, 1997, Southwestern Bell Telephone Company (SWBT) and USA Exchange, L.L.C. doing business as Omniplex Communications Group (USA) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code)(FTA) and the Public Utility Regulatory Act of 1995, Texas Revised Civil Statutes Annotated, Article 1446c-0, (Vernon 1997) (PURA). The joint application has been designated Docket Number 17868. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17868. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by October 15, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to Public Utiltiy Commission Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17868.

Issued in Austin, Texas, on August 28, 1997.

TRD-9711400
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 28, 1997

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On August 22, 1997, GTE Southwest, Inc. (GTE-SW) and W.T. Services, Inc. (WT) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code)(FTA) and the Public Utility Regulatory Act of 1995, Texas Revised Civil Statutes Annotated, Article 1446c-0, (Vernon 1997) (PURA). The joint application has been designated Docket Number 17867. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17867. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by October 15, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to Public Utility Commission Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17867.

Issued in Austin, Texas, on August 28, 1997.

TRD-9711401
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 28, 1997

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On August 22, 1997, Southwestern Bell Telephone Company (SWBT) and Teligent, L.L.C. (Teligent) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act of 1995, Texas Revised Civil Statutes Annotated, Article 1446c-0, (Vernon 1997) (PURA). The joint application has been designated Docket Number 17863. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or

rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17863. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by October 15, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to P.U.C. Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17863.

Issued in Austin, Texas, on August 28, 1997.

TRD-9711402
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 28, 1997

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On August 22, 1997, Southwestern Bell Telephone Company (SWBT) and U.S. West Interprise America, Inc. doing business as Interprise America (U.S. West) collectively referred to as Applicants, filed a joint application for approval of an interconnection agreement under the federal Telecommunications Act of 1996, Public Law Number 104-104, 110 Statute 56, (codified as amended in scattered sections of 15 and 47 United States Code) (FTA) and the Public Utility Regulatory Act of 1995, Texas Revised Civil Statutes Annotated, Article 1446c-0, (Vernon 1997) (PURA). The joint application has been designated Docket Number 17862. The joint application and the underlying interconnection agreement are available for public inspection at the commission's offices in Austin, Texas.

The FTA authorizes the commission to review and approve any interconnection agreement adopted by negotiation of the parties. Pursuant to FTA §252(e)(2) the commission may reject any agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement, or any portion thereof, is not consistent with the public interest, convenience, and necessity. Additionally, under FTA §252(e)(3), the commission may establish or enforce other requirements of state law in its review of the agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. The commission must act to approve the agreement within 90 days after it is submitted by the parties. The parties have requested expedited review of this application.

The commission finds that additional public comment should be allowed before the commission issues a final decision approving or rejecting the interconnection agreement. Any interested person may file written comments on the joint application by filing 13 copies of the comments with the commission's filing clerk. Additionally, a copy of the comments should be served on each of the Applicants. The comments should specifically refer to Docket Number 17862. As a part of the comments, an interested person may request that a public hearing be conducted. The comments, including any request for public hearing, shall be filed by October 15, 1997, and shall include:

1) a detailed statement of the person's interests in the agreement, including a description of how approval of the agreement may adversely affect those interests;

2) specific allegations that the agreement, or some portion thereof:

a) discriminates against a telecommunications carrier that is not a party to the agreement; or

b) is not consistent with the public interest, convenience, and necessity; or

c) is not consistent with other requirements of state law; and

3) the specific facts upon which the allegations are based.

After reviewing any comments, the commission will determine whether to conduct further proceedings concerning the joint application. The commission shall have the authority given to a presiding officer pursuant to Public Utility Commission Procedural Rule §22.202. The commission may identify issues raised by the joint application and comments and establish a schedule for addressing those issues, including the submission of evidence by the Applicants, if necessary, and briefing and oral argument. The commission may conduct a public hearing. Interested persons who file comments are not entitled to participate as intervenors in the public hearing.

Persons with questions about this docket or who wish to comment on the application should contact the Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. You may call the Public Utility Commission Office of Customer Protection at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Docket Number 17862.

Issued in Austin, Texas, on August 28, 1997.

TRD-9711403
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: August 28, 1997

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Texas Savings and Loan Department

Notice of Application for Rebuttal of Control of a Savings Bank

Notice is hereby given that on August 25, 1997, application was filed with the Savings and Loan Commissioner of Texas by: Harold D. Courson for approval for rebuttal of control of Interstate Bank, ssb, Perryton, Texas.

This application is filed pursuant to rule 7 TAC §;75.121-75.127 of the Rules and Regulations Applicable to Texas Savings Banks. These rules are on file with the Secretary of State, Texas Register Division, or may be seen at the Department's offices in the Finance Commission Building, 2601 North Lamar Boulevard, Suite 201, Austin, Texas 78705.

Issued in Austin, Texas, on August 26, 1997.

TRD-9711266
James L. Pledger
Commissioner
Texas Savings and Loan Department
Filed: August 26, 1997

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Somervell County Commissioners' Court

Notice of Intent to Submit Request to Texas Department of Human Services to Contract for Additional Medicaid Nursing Home Beds in Somervell County

The Commissioners' Court of Somervell County, pursuant to House Bill 606, 75th Regular Legislative Session, hereby gives notice of its intent to request that the Texas Department of Human Services contract for additional nursing home beds under the state Medicaid program in Somervell County without regard to the occupancy rate of available Medicaid beds.

The Commissioners' Court hereby requests that interested parties submit comments on whether the request should be made. Further, the Commissioners' Court request proposals from persons interested in providing additional Medicaid beds in the county, including persons providing Medicaid beds in a nursing home facility with a high occupancy rate.

Interested parties must forward comments or proposals received no later than September 22, 1997, at 10:00 a.m. to the Somervell County Auditor's Office, 101 Northeast Barnard Street, P.O. Box 804, Glen Rose, Texas 76043. Proposals shall be discussed in open Commissioners' Court at 10:05 a.m. on the same date in the Somervell County Annex Courtroom.

If the Commissioners' Court determines to proceed with a request after considering all comments and proposals received, it may recommend that the Texas Department of Human Services contract with a specific nursing facility that submitted a proposal. In making its decisions, the Commissioners' Court must consider:

(1) the demographic and economic needs of the county;

(2) the quality of existing nursing facility services under the state Medicaid program in the county;

(3) the quality of the proposals submitted; and

(4) the degree of community support for additional nursing facility services.

Issued in Austin, Texas, on August 29, 1997.

TRD-9711496
Darrell Morrison
County Auditor
Somervell County Commissioners' Court
Filed: August 29, 1997

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Workforce Development Board of the Coastal Bend

Request For Proposal (RFP)

The Workforce Development Board of the Coastal Bend (WDBCB) is seeking proposals for the management and operation of its Customer Service Centers, incorporating, at a minimum, services through the following programs: Job Training Partnership Act (JTPA), Job Opportunities and Basic Skills (JOBS), and Food Stamp Employment and Training (FSE&T). Proposals will be accepted until 4:00 p.m. at Holiday Inn Airport located at 5549 Leopard Street, Corpus Christi, Texas. Prospective proposers may obtain one (1) copy of the RFP package at the conference or by contacting Mike Hefley at (512) 889-5300, ext. 223. The WDBCB reserves the right to accept or reject any or all proposals.

The WDBCB is an Equal Opportunity employer/program. Minority, disadvantaged and women's businesses are encouraged to apply. Auxiliary aids and services are available upon request to individuals with disabilities. Telephone access is available through (TDD) 1-800-RELAY TX.

Issued in Austin, Texas, on August 25, 1997.

TRD-9711389
Carlos Herrera
Interim President and CEO
Workforce Development Board of the Coastal Bend
Filed: August 28, 1997

Texas Register
Services

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